TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 33

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RAYMOND I. BASHFORD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 22, 1937

CERTIORARI GRANTED MAY 24, 1937

SUPREME COURT OF THE UNITED STATES

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RECORD

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
For the Third Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

RAYMOND I. BASHFORD,
Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals

DOCKET ENTRIES

1933	
Apr. 27:	Petition received and filed. Taxpayer notified. (Fee paid)
Apr. 28:	Copy of petition served on General Counsel.
Jun. 22:	Answer filed by General Counsel.
Jul. 5:	Copy of answer served on taxpayer.

1934

Aug. 25: Hearing set Nov. 5, 1934.

Sep. 15: Motion for continuance to Nov. 22, 1934 filed by taxpayer. 9/17/34 granted.

Nov. 2: Motion for continuance filed by taxpayer.

Nov. 2: Notice of the appearance of Stanley Suydam, counsel for taxpayer, filed.

Nov. 6: Hearing set Nov. 7, 1934 on motion.

Nov. 6: Copy of notice of hearing date and motion served on General Counsel.

Nov. 7: Hearing had before Mr. Arundell on motion to continue—denied.

Nov. 7: Order denying motion for continuance and proceeding will remain on the Day Calendar of 11/22/34 for hearing on merits entered.

Nov. 14: Notice to send future notices to Stanley Suydam filed by Walter A. Cooper.

Nov. 20: Notice of the appearance of Walter G. Moyle, counsel for taxpayer, filed.

Nov. 20: Motion for continuance to 12/10/34 filed by taxpayer. Granted.

Dec. 7: Notice of the appearance of Earl B. Breeding, counsel for taxpayer, filed.

Dec. 10: Hearing had before Mr. Smith on merits —submitted. Dockets 71565 and 71846 consolidated for hearing. Stipulation of facts filed. Petitioner's brief due 2/10/35 —reply 3/15/35. Respondent's brief due 3/1/35.

Dec. 19: Transcript of hearing of Dec. 10, 1935 filed.

1935

Jan. 23: Motion to amend petition to conform to

the proof filed by taxpayer. 1/24/35 granted.

Feb. 4: Motion to extend time for one month to file all briefs filed by taxpayer.

Feb. 4: Motion for leave to file stipulation to correct transcript of testimony filed by taxpayer. 2/5/35 granted.

Feb. 4: Stipulation of correction lodged.

Mar. 5: Motion for extension of one month for briefs granted.

Mar. 9: Brief filed by taxpayer. 3/11/35 copy served on General Counsel.

Mar. 23: Brief filed by General Counsel.

Mar. 28: Motion for extension to 4/17/35 to file reply brief filed by taxpayer. 3/28/35 granted.

Apr. 9: Notice to send future notices to Walter G. Moyle filed by Stanley Suydam.

Apr. 15: Motion for extension to May 2, 1935 to file reply brief filed by taxpayer. 4/15/35 granted.

May 1: Reply brief filed by taxpayer. 5/1/35 copy served on General Counsel.

Sep. 10: Opinion rendered—Charles P. Smith, Division 5. Judgment will be entered under Rule 50.

Oct. 2: Notice of settlement filed by General Counsel.

Oct. 4: Hearing set Oct. 23, 1935 on settlement.

Oct. 10: Consent to settlement filed by taxpayer.

Oct. 14: Decision entered—Charles P. Smith, Division 5.

1936

Jan. 6: Petition for review by U. S. Circuit Court

of Appeals, 3rd Circuit, with assignments of error filed by General Counsel.

Jan. 30: Proofs of service filed by General Counsel (2).

Feb. 24: Motion for extension to March 25, 1936 to settle and transmit record filed by General Counsel.

Feb. 24: Order enlarging time to 3/25/36 for preparation of evidence and delivery of record entered.

Mar. 20: Motion for extension of time from March 25, 1936 to May 25, 1936 to settle and transmit record filed by General Counsel.

Mar. 20: Order enlarging time to May 25, 1936 for preparation of evidence and delivery of record entered.

Apr. 21: Statement of evidence lodged.

Apr. 21: Notice of lodgment of statement with hearing notice 5/6/36 filed—proof of service thereon.

Apr. 21: Praecipe filed with proof of service thereon.

Apr. 29: Notice of objections and proposed amendments to statement of evidence filed by taxpayer—proof of service thereon.

May 6: Hearing had before Mr. Sternhagen on approval of statement of evidence—continued one week.

May 6: Order of continuance to May 13, 1936 for hearing on approval of statement of evidence entered.

May 12: Agreed statement of evidence approved and ordered filed.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT:AR:B3 CEO-60D, dated March 1, 1933, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual residing at 260 South Broad Street, Philadelphia, Pennsylvania.

2. The notice of deficiency, a copy of which is attached and marked Exhibit "A", was mailed to the petitioner on March 1, 1933.

3. The taxes in controversy are income taxes for the calendar year 1930 and for thirty-five thousand, nine hundred forty-one dollars and sixty-three cents ($35,941.63).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The respondent erred in increasing, in the amount of seven hundred ($700) dollars, the amount reported as cash received upon the exchange by the petitioner of twenty-five hundred twenty-one (2,521) shares of Peerless Explosives Stock for cash and stocks in the Atlas Powder Company and Peerless-Union Explosives Company.

(b) The respondent erred in placing a value of one hundred ($100) dollars per share on six hundred twenty-five (625) shares of Atlas Powder Com-

pany preferred stock received by petitioner in exchange for the aforementioned Peerless Explosives stock.

(c) The respondent erred in placing a value of sixty-six dollars and sixty-six and two-thirds cents ($66.66-2/3) on thirteen hundred forty-four (1,344) shares of Atlas Powder Company common stock received by petitioner in aforementioned exchange of Peerless Explosives stock.

(d) The respondent erred in including in taxable income the value of six hundred twenty-five (625) shares of Atlas Powder Company preferred stock, received by petitioner in exchange of Peerless Explosives stock owned by petitioner.

(e) The respondent erred in including in taxable income the value of thirteen hundred forty-four (1,344) shares of Atlas Powder Company common stock, received by petitioner in exchange of Peerless Explosives stock owned by petitioner.

(f) Respondent erred in failing to determine the tax on the taxable profit realized through the said exchanges at capital net gain rates as provided in section 101 of the Revenue Act of 1928.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A1. The petitioner received the amount of twenty-five thousand, three hundred six dollars and sixty-seven cents ($25,306.67) in cash upon exchange of twenty-five hundred twenty-one (2,521) shares of Peerless Explosives stock.

A2. Respondent, without explanation, has increased the aforementioned amount to twenty-six thousand, six dollars and sixty-seven cents ($26,006.67), thus increasing taxable income reported by seven hundred dollars ($700.00).

B1. The respondent arbitrarily placed a value of $100.00 per share on Atlas Powder Company preferred stock whereas petitioner alleges that a substantially lower price, not in excess of $90.00 per share, reflects the "fair market value" at date of exchange.

C1. The respondent arbitrarily placed a value of $66.66-2/3 per share on Atlas Powder Company common stock whereas petitioner alleges that a substantially lower price, not in excess of $60.00 per share, reflects the "fair market value" at date of exchange.

D & E1. The exchange of Peerless Explosives stock by petitioner was made in pursuance of an agreement entered into on October 7, 1930.

2. The reorganization of the Peerless Explosives Company involved four parties or groups of parties, to wit:

Group 1—The Peerless Explosives Company, its subsidiary, the Black Diamond Powder Company and its stockholders.

Group 2—The Union Explosives Company and its stockholders.

Group 3—Peerless-Union Explosives Corporation (a subsidiary of Atlas Powder Company) organized pursuant to the plan of reorganization.

Group 4—The Atlas Powder Company.

3. Pursuant to, and simultaneously on the same day, October 7, 1930, the plan of reorganization was consummated and Peerless-Union Explosives Corporation acquired over 99% of all classes of the stock of Peerless Explosives Company, Black Diamond Powder Company and Union Explosives Company.

4. Peerless Explosives Company issued all of its outstanding preferred stock to Atlas Powder Company and its common stock to both Atlas Powder Company and the stockholders of Peerless and Union.

5. Atlas Powder Company delivered directly to the stockholders of Peerless Explosives Company and of Union Explosives Company certain shares of its preferred and common stock and to both the said stockholders and to Peerless-Union Explosives Company cash.

6. Atlas Powder Company received additional common and all of the preferred stock of Peerless-Union.

7. The Stockholders of Peerless and of Union received common stock of Peerless-Union, and preferred and common stock of Atlas Powder Company and cash.

8. The shares held by the stockholders in favor of and contracting to the reorganization plan were as follows:

	Total Outstanding Shares	Shares held by Contracting Parties
Peerless Explosives Company— Preferred Stock	17,672	16,128
Peerless Explosives Company— Common Stock	14,890	14,288
Union Explosives Company— Preferred Stock	3,367½	3,367½
Union Explosives Company— Common Stock	4,044	4,044

9. The parties to the reorganization plan were, according to the plan of reorganization, entitled to receive Peerless-Union stock as follows:

Preferred Stock:

	Shares	Percentage
Atlas Powder Company	21,732	100%

Common Stock:

Atlas Powder Company	32,198	54.34+
Assenting stockholders of Predecessor Companies	27,054-54/100	45.65+
	59,252-54/100	100%

F1. The respondent placed the amount of taxable profit as determined by him in ordinary taxable income brackets of tax computation.

2. The petitioner owned and held the Peerless Explosives stock, exchanged pursuant to the plan of reorganization, since 1922, thereby conclusively establishing the stock as a Capital Asset and subject to only 12½% tax at his election to include income from sale of it in such taxable bracket.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and determine this appeal and grant relief from the deficiency as asserted by the respondent and find that the petitioner was correct in returning twenty-five thousand, three hundred six dollars and sixty-seven cents ($25,306.67) as income, from exchange of Peerless Explosives stock, in 1930; that the respondent erred in placing a value of $100 per share on Atlas Powder Company Preferred Stock as of date of exchange;

that the respondent erred in placing a value of $66.66-2/3 per share on Atlas Powder Company Common Stock as of date of exchange; that the respondent erred in failing to exclude from taxable income the value of the Atlas Powder Company Preferred and Common Stocks; that respondent erred in determining the tax on the gain on the said exchange at ordinary income and surtax rates; and that the Board may give and grant such other and further relief as the Board may deem fit and proper.

WALTER A. COOPER,
Counsel for the Petitioner,
120 Broadway, New York,
N. Y.

State of Delaware,
County of New Castle, ss:

RAYMOND I. BASHFORD, being duly sworn, says that he is the petitioner named in the foregoing petition, and as such is duly authorized to verify the foregoing petition and is familiar with the statements therein contained and that the facts therein stated are true.

RAYMOND I. BASHFORD.

Subscribed to before me this 26th day of April, 1933.

P. W. PARVIS,
Notary Public.

EXHIBIT "A"

TREASURY DEPARTMENT

Washington

Mar. 1, 1933

Mr. Raymond I. Bashford,
260 South Broad Street,
Philadelphia, Pennsylvania.

Sir:

You are advised that the determination of your tax liability for the year 1930 discloses a deficiency of $35,941.63, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM

IS NOT FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.

(Signed) By W. T. SHERWOOD
Acting Deputy Commissioner.

Inclosures:
Statement.
Form 870

STATEMENT

IT:AR:B-3
CEO-60D

In re: Mr. Raymond I. Bashford,
260 South Broad Street,
Philadelphia, Pennsylvania.

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1930	$38,974.68	$3,033.05	$35,941.63

The records of this office indicate that during the year 1930, you exchanged certain shares of stock of the Peerless Explosives Company for cash and stock in the Peerless-Union Explosives Company. You also received 625 shares of preferred stock of the Atlas Powder Company valued at $100.00 per share and 1,344 shares of common stock of the same company having a value of $66 2/3 per share. Under the provisions of section 112(c) (1) of the Revenue Act of 1928, the amount of cash received as well as

the value of the Atlas Powder Company stock is taxable income. Your income tax liability has accordingly been recomputed as follows:

Net income reported on return		$ 38,816.29
Profit on exchange of stock		
Cash	$ 26,006.67	
625 shares preferred stock Atlas Powder Company at $100.00 per share	62,500.00	
1,344 shares common stock Atlas Powder Company at $66 2/3 per share	89,600.00	
	$178,106.67	
Profit on above reported on your return	25,306.67	
Profit not reported		152,800.00
Net income as adjusted		$191,616.29

Mr. Raymond I. Bashford — Statement

Brought forward		$191.616.29
Less:		
Dividends received	$ 1,452.89	
Personal exemption and credit for dependents	5,100.00	6,552.89
Subject to normal tax		$185,063.40
Normal tax at 1 ½ per cent on $4,000.00		$ 60.00
Normal tax at 3 per cent on $4,000.00		120.00

Normal tax at 5 per cent on $177,063.40	8,853.17
Surtax on $191,616.29	29,983.26
Total	$ 39,016.43
Less:	
Earned income credit	41.75
Income tax liability	$ 38,974.68
Previously assessed	3,033.05
Deficiency	$ 35,941.63

Computation of Earned Income Credit

Earned net income	$ 12,000.00
Less:	
Personal exemption and credit for dependents	5,100.00
Income subject to normal tax	$ 6,900.00
Normal tax at 1½ per cent on $4,000.00	$ 60.00
Normal tax at 3 per cent on $2,900.00	87.00
Surtax on $12,000.00	20.00
Total Tax	$ 167.00
Credit of 25 per cent of above	$ 41.75

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1930, the Income Tax Unit will be unable to afford you an opportunity to discuss your case before mailing formal notice of its determination as provided by section 272(a) of the

Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

ANSWER

Comes now the respondent by his attorney, E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, and in answer to the petition of the petitioner, admits, denies and alleges as follows:

1, 2 and 3. Admits the allegations contained in paragraphs one, two and three of the petition.

4. (a) to (f) inc. Denies that the respondent committed errors as alleged in sub-paragraphs (a) to (f) inc. of paragraph four of the petition.

5. A1. Alleges that the petitioner received $26,006.67 in cash upon exchange of 2,521 shares of Peerless Explosives stock, instead of only $25,306.67 as alleged in paragraph five A1. of the petition.

5. A2. Admits the allegations contained in paragraph five A2. of the petition.

5. B1. Admits that the respondent placed a value of $100.00 per share on Atlas Powder Company preferred stock, but denies the remaining allegations contained in paragraph five B1. of the petition.

5. C1. Admits that the respondent placed a value of $66.66 2/3 per share on Atlas Powder Company common stock, but denies the remaining al-

legations contained in paragraph five C1. of the petition.

5. D and E1. Admits the allegations contained in paragraph five D and E1. of the petition.

5. D and E2. to 9 inc. Denies each and every allegation contained in sub-paragraphs 2 to 9 inc. of paragraph styled five D and E of the petition, that is contrary to or inconsistent with the determination of the Commissioner as set forth in the notice of deficiency.

5. F1. Admits the allegations contained in paragraph five F1. of the petition.

5. F2. Denies the allegations contained in paragraph five F2. of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the petitioner's appeal be denied and the Commissioner's determination of deficiency be approved.

(Sgd) E. BARRETT PRETTYMAN,
General Counsel,
Bureau of Internal
Revenue.

Of Counsel:

DEWITT M. EVANS,
Special Attorney
Bureau of Internal Revenue.

MOTION TO AMEND PETITION TO CONFORM TO PROOF

Now comes the Petitioner, through his counsel, and respectfully moves this Honorable Board for permission to amend his Petition to conform to the proof in this cause, the hearing of which was held before this Board on December 10, 1934, in the following particulars:

(1). By substituting for the words "twenty-five hundred twenty-one (2521) shares of Peerless Explosives Stock" in Paragraph 4 (a) (1) thereof, the words "Twenty-five hundred thirty-four and forty-eight one hundredths (2534.48) shares of Peerless Explosives Common Stock".

(2). By substituting for the words "twenty-five hundred twenty-one (2521) shares of Peerless Explosives Stock" in Paragraph 5 (a) (1) thereof, the words "twenty-five hundred thirty-four and forty-eight one hundredths (2534.48) shares of Peerless Explosives Common Stock".

(3). By changing the words "Peerless Explosives Company" at the beginning of Paragraph 5 (a) (4) thereof to "Peerless-Union Explosives Corporation".

(4). By striking out from the first line of Paragraph 5 (e) (5), near the bottom of Page 3 thereof, the word "directly" and substitute therefor the following: "through the First National Bank of Ta-

maqua, Pennsylvania, and/or Peerless-Union Explosives Corporation".

(5). By the following change in Paragraph 5 (e) (9), after the words "Common Stock: Atlas Powder Company", to substitute for the figures "32,198" and the percentage opposite thereto of "54.34 (plus)" the following: "32,198 issued in the name of Atlas Powder Company and 5,000 issued in certificates of 2500 each to Messrs. Seligman and Fletcher as nominees for Atlas Powder Company" and the percentage opposite thereto to read "62.77 (plus)".

As grounds for this Motion counsel asserts that these changes conform to the Stipulation introduced in evidence and to the oral testimony given at the hearing on December 10, 1934. Petitioner's counsel moved that these changes, with the exception of the one first mentioned herein, be made at the time of the hearing, as shown on Pages 137 and 138 of the Official Report of the Proceedings. The Board Member at that time suggested that this formal Motion be filed at the time or prior to the filing of Petitioner's Brief.

Respectfully,

WALTER G. MOYLE, (signed)
STANLEY SUYDAM (signed)
Counsel for Petitioner.

Dated
January 23, 1935.

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the respective parties hereto that the following are some of the facts pertinent to the issues herein involved; that this Board may predicate its decision herein upon these facts and that the parties hereto, by their respective attorneys, respectively reserve the right to introduce such further evidence and adduce such further testimony as may be necessary and pertinent to a full presentation of the issues herein to the Honorable Board and not inconsistent with the facts herein stipulated.

I.

On and prior to October 7, 1930 the Peerless Explosives Company was a corporation organized and existing under and by virtue of the laws of the State of Delaware. On and prior to October 7, 1930 there were issued and outstanding 17,672 shares of Preferred Stock of Peerless Explosives Company and 14,890 shares of Common Stock of Peerless Explosives Company. The Preferred Stock had a par value of $25.00 per share and the Common Stock was without nominal or par value.

II.

On and prior to October 7, 1930 the Union Explosives Company was a corporation organized and existing under and by virtue of the laws of the State of West Virginia. On and prior to October 7, 1930

there were issued and outstanding 3,367½ shares of preferred stock of the Union Explosives Company and 4,044 shares of the common stock of the Union Explosives Company. The preferred stock had a par value of $100 per share and the common stock was without nominal or par value.

III.

On and prior to October 7, 1930, the Black Diamond Powder Company was a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania. On and prior to October 7, 1930 there were issued and outstanding 1,584 shares of common stock of the Black Diamond Powder Company, all of which was owned by the Peerless Explosives Company. The Black Diamond Powder Company had no preferred stock issued or outstanding and the common stock had a value of $100.00 per share.

IV.

The business of the Peerless Explosives Company, the Union Explosives Company and the Black Diamond Powder Company was that of manufacturing and selling certain explosives.

V.

On or about the 22nd day of September 1930 the Peerless-Union Explosives Corporation was incorporated under the laws of the State of Delaware.

VI.

On or about October 6, 1930 the authorized capital

stock of the Peerless Union Explosives Corporation was increased from 500 shares of Preferred Stock of the par value of $100 per share and 500 shares of the Common Stock, without nominal or par value, to 50,000 shares of Preferred Stock of the par value of $100.00 per share and 100,000 shares of the Common Stock, without nominal or par value.

VII.

On and prior to October 7, 1930 the Atlas Powder Company was a corporation organized and existing under and by virtue of the laws of the State of Delaware, engaged in the general business of the manufacture of explosives and related products, including components thereof.

On or prior to October 7, 1930 there was issued and outstanding 261,438-3/4 shares of the Common Stock of no par value, including treasury stock and 90,000 shares of the par value of $100.00, including treasury stock.

Referred to in this Stipulation, the outstanding capital issue stock of the Atlas Powder Company was as follows: 261,438-3/4 shares of Common Stock (including treasury stock), 96,318 shares of the Preferred Stock (including treasury stock). The increase of 6,318 shares was entirely of newly issued Preferred Stock. The changes made in the issued and outstanding capital stock of the Atlas Powder Company, as the result of the transactions of October 7, 1930, referred to in this Stipulation, are fully set forth in the Minutes of the Meetings of the Board of Directors of the Atlas Powder Company of October 2, 1930 and December 3, 1930, true copies of which, marked Exhibit "A" and Exhibit

"B" are attached hereto and made a part hereof by reference.

VIII.

On or about the 23rd day of September 1930 the Directors of the Peerless-Union Explosives Corporation met and elected H. K. Seligman President and W. E. Fletcher a Vice-President and Secretary. On this day the Atlas Powder Company owned all of the issued and outstanding stock of the Peerless-Union Explosives Corporation, the same being 10 shares of preferred stock and 10 shares of the common stock for which the Atlas Powder Company paid the sum of $1,000.00 in full payment for said 10 shares of preferred stock and $1.00 in full payment for said 10 shares of common stock.

IX.

On the 2nd day of October 1930 the Directors of the Atlas Powder Company held a Special Meeting at the offices of the Company at Wilmington, Delaware. Attached hereto and made a part hereof by reference, marked Exhibit "A" is a true copy of the Minutes of said Meeting. Pursuant to the authorization as provided in said Minutes the Atlas Powder Company, on October 7, 1930, paid to the Peerless-Union Explosives Corporation the sum of $959,559.25 and on the same date the Atlas Powder Company delivered to the Peerless-Union Explosives Corporation, in the form of "temporary receipts" dated October 7, 1930, 6,318 shares of its Preferred Stock, and 8,712½ shares of its Common Stock issued in the names of the stockholders of Peerless Explosives Company and Union Explo-

sives Company, to whom they were thereupon delivered by the Peerless-Union Explosives Corporation, as set forth in Exhibits "O" and "P" attached hereto. There were issued and delivered to the Atlas Powder Company on October 7, 1930 21,722 shares of the preferred stock and 32,188 shares of the common stock of the Peerless-Union Explosives Corporation, thus at the close of October 7, 1930 Atlas Powder Company was the owner of record of 21,732 and 32,198 shares of the preferred and common stock, respectively, of the Peerless-Union Explosives Corporation.

X.

Raymond I. Bashford, E. Frost and Edward R. Day on the one hand and H. K. Seligman and W. E. Fletcher on the other entered into an Agreement, a true copy of which is attached hereto, marked Exhibit "C" and made a part hereof by reference.

XI.

J. Edgar Long on the one hand and H. K. Seligman and W. E. Fletcher on the other entered into an Agreement, a true copy of which is attached hereto, marked Exhibit "D" and made a part hereof by reference.

XII.

H. K. Seligman and W. E. Fletcher on the one hand and the Peerless-Union Explosives Corporation on the other entered into an Agreement. Attached hereto, marked Exhibit "E" and made a part hereof by reference is a true copy of said Agreement.

XIII.

An agreement was entered into between Edward R. Day, "Party of the first part"; Peerless-Union Explosives Corporation, "Party of the second part" and the Atlas Powder Company, "Party of the third part". A true copy of said Agreement is attached hereto, marked Exhibit "F" and made a part hereof by reference.

XIV.

Raymond I. Bashford, "Party of the first part", Peerless-Union Explosives Corporation, "Party of the second part" and the Atlas Powder Company, "Party of the third part" entered into an Agreement. A true copy of said Agreement is attached hereto, marked Exhibit "G" and made a part hereof by reference.

XV.

Eugene Frost, "Party of the first part", Peerless-Union Explosives Corporation, "Party of the second part" and the Atlas Powder Company, "Party of the third part" entered into an Agreement. Attached hereto, marked Exhibit "H" and made a part hereof by reference is a true copy of said Agreement.

XVI.

The Peerless-Union Explosives Corporation addressed a letter to Eugene Frost. Attached hereto, marked Exhibit "J" and made a part hereof by reference is a true copy of said letter.

XVII.

On October 7, 1930 the Peerless Explosives Company, by Bill of Sale, granted, bargained, sold, assigned, transferred and set over, in consideration of the sum of $1,036,800.00 represented by the note of the Peerless-Union Explosives Corporation in that amount, to Peerless-Union Explosives Corporation, subject to its liabilities, all of its property and assets, including all of the outstanding stock of the Black Diamond Powder Company and the latter Company thereupon, by Bill of Sale, granted, bargained, sold, assigned, transferred and set over to Peerless-Union Explosives Corporation, subject to its liabilities, all of its property and assets. This sale was approved by the holders of 92% and 97% respectively, of the outstanding preferred and common stock of the Peerless Explosives Company. On December 16, 1930 the Black Diamond Powder Company was dissolved.

XVIII.

On or about October 7, 1930 the Union Explosives Company, by Bill of Sale, granted, bargained, sold, assigned, transferred and set over, in consideration of the sum of $871,750.00, represented by a note of Peerless-Union Explosives Corporation in that amount, to the Peerless-Union Explosives Corporation, subject to its liabilities, all of its property and assets and on the 25th of November, 1930 the Union Explosives Company was dissolved.

XIX.

On or about the 5th day of January 1931 the Directors of the Peerless Explosives Company met and

resolved that the Corporation should be dissolved. Attached hereto, marked Exhibit "K" and made a part hereof by reference is a true copy of the Minutes of the Directors Meeting referred to. There was delivered to Montgomery and McCracken, the Attorneys who were performing legal services in connection with the transactions herein described, for filing under the laws of the State of Delaware, the original Certificate of Dissolution (a true copy of which, marked Exhibit "L" is attached hereto and made a part hereof by reference) duly executed by H. K. Seligman, President and W. E. Fletcher, Secretary and Treasurer of the Company attached to which was the consent to the dissolution signed by the Peerless-Union Explosives Corporation and its nominees, representing the holders of record of all of the outstanding capital stock of the Company. Robert C. Walker, a partner of the firm of Montgomery and McCracken, who was handling the matter for said firm, would testify, if personally present at the hearing before this Board that the failure of his firm to file the Certificate of Dissolution at the time it was delivered to him for filing by the Peerless Explosives Company until December 31, 1931 was due to an oversight in his office. The Peerless Explosives Company was dissolved on December 31, 1931.

XX.

On October 7, 1930 Raymond I. Bashford, the Petitioner herein, owned 2,541 shares of the Common Stock of the Peerless Explosives Company and 28 shares of the Preferred Stock of the Peerless Explosives Company. Said Raymond I. Bashford ac-

tually exchanged on October 7, 1930, 2534.38 shares of the Common Stock of the Peerless Explosives Company for $25,306.67 in cash; 625 shares of the Preferred Stock of Atlas Powder Company; 1,344 shares of the Common Stock of Atlas Powder Company and 2,720.08 shares of Common Stock of Peerless-Union Explosives Corporation. There is attached hereto, made a part hereof by reference and marked Exhibit "M", a true copy of the receipt of Raymond I. Bashford dated October 7, 1930 for the cash and securities referred to herein.

The remaining 6.62 shares of Common Stock of the Peerless Explosives Company owned by Bashford on October 7, 1930 and not included in said exchange were transferred by him to certain other stockholders of the Peerless Explosives Company, included in the majority group who exchanged 8,500 shares of Peerless Explosives Company stock on October 7, 1930, without consideration, to Petitioner and as a matter of convenience in affording all stockholders within the group a uniform basis of exchange.

XXI.

On October 7, 1930 Messrs. Bashford, Frost and Day, pursuant to their Agreements, copies of which are attached hereto, marked Exhibit "C" and Exhibit "E" respectively, delivered, caused to be delivered, transferred or caused to be transferred 8,500 shares of the Common Stock of the Peerless Explosives Company to the Peerless-Union Explosives Corporation. Attached hereto, marked Exhibit "N" and made a part hereof by reference is a schedule which correctly shows the following:

The names of the record holders of said 8500 shares of the Common Stock of Peerless Explosives Company; the number of shares owned by each of said stockholders immediately prior to the exchanges of October 7, 1930 involved herein; and a statement of the number of shares actually exchanged by each of said stockholders on which settlements were based as provided for in said Agreements marked Exhibit "C" and Exhibit "E".

Immediately prior to said exchanges Petitioner and several other stockholders within said group gave certain of their shares to others in the group, without consideration. These changes are reflected in the differences between the column showing the record ownership of each stockholder and the column showing the amount of stock each stockholder actually exchanged and which formed a basis of the settlement.

XXII.

On October 7, 1930 in exchange for the number of shares of the Common Stock of Peerless Explosives Corporation shown opposite the names of the individuals listed as the record holders of the Common Stock of the Peerless Explosives Corporation, Exhibit "N" there was issued and delivered to such individuals, or to their order, the number of dollars, the number of shares of the Preferred Stock of the Atlas Powder Company, the number of shares of the Common Stock of the Atlas Powder Company and the number of shares of the Common Stock of the Peerless-Union Explosives Corporation set opposite their names in the schedule which is attached hereto, marked Exhibit "O" and made a part here-

of by reference. Each of the stockholders referred to herein gave to Peerless-Union Explosives Corporation a receipt for cash and securities received by them similar in form to that (Exhibit "M") given by Raymond I. Bashford, Petitioner herein.

XXIII.

On October 7, 1930 H. K. Seligman and W. E. Fletcher delivered to the Peerless-Union Explosives Corporation 16,128 shares of the Preferred Stock of the Peerless Explosives Company and 14,288 shares of the Common Stock of Peerless Explosives Company, 3367½ shares of the Preferred Stock of the Union Explosives Company, 4044 shares of the Common Stock of Union Explosives Company, all such certificates being duly endorsed for transfer, at the same time authorizing Peerless-Union Explosives Corporation to issue and deliver to the First National Bank of Tamaqua the sum of $507,150 in cash and certificates for 8,685-54/100 shares of the Common Stock of the Peerless-Union Explosives Corporation, and to deliver and distribute the sum of $125,000 in cash and temporary receipts for 6,318 shares of the Preferred Stock and 8712½ shares of the Common Stock of Atlas Powder Company and certificates for 23,510.25 shares of the Common Stock of Peerless-Union Explosives Corporation, to the stockholders of Peerless Explosives Company and the Union Explosives Company, as set forth in Exhibits "O" and "P" attached hereto.

XXIV.

Pursuant to the direction of Messrs. Seligman and

Fletcher referred to in the paragraph last preceding the Peerless-Union Explosives Corporation delivered to the First National Bank of Tamaqua the sum of $507,150 in cash and certificates for 8,685-54/100 shares of the Common Stock of the Peerless-Union Explosives Corporation.

XXV.

Pursuant to the authorization and direction referred to in Paragraph XXIII hereof, ante, the First National Bank of Tamaqua delivered to the record holders of the Common and Preferred Stock of the Peerless Explosives Company, comprising the minority who subscribed to the plan of exchange of Peerless Stock for cash and Common Stock of Peerless-Union Explosives Corporation the sum of $403,200 and 6447.79 shares of the Common Stock of the Peerless-Union Explosives Corporation in exchange for 16,128 shares of the Preferred Stock of the Peerless Explosives Company and 5783 shares of the Common Stock of Peerless Explosives Company.

XXVI.

Pursuant to the direction and authority referred to in Paragraph XXIII ante, the First National Bank of Tamaqua delivered to the individuals, the record holders of the number of shares of Preferred and Common Stock of the Union Explosives Company set opposite their names in Exhibit "P", attached hereto and made a part hereof by reference, the number of dollars and the number of shares of the Common Stock of Peerless-Union Explosives Corporation set opposite their names in said Exhibit

"P", thus delivering the total sum of $103,950.00 and 2096.50 shares of the Common Stock of the Peerless-Union Explosives Corporation in exchange for 937 shares of the Preferred Stock of Union Explosives Company and 1128 shares of the Common Stock of the Union Explosives Company.

XXVII.

Pursuant to the authorization and direction referred to in Paragraph XXIII ante, the Peerless-Union Explosives Corporation delivered to J. Edgar Long 9,510.25 shares of the Common Stock of Peerless-Union Explosives Corporation, 5,000 shares of the Common Stock of the Atlas Powder Company and 4,093 shares of the Preferred Stock of the Atlas Powder Company in exchange for 2,430½ shares of the Preferred Stock of the Union Explosives Corporation and 2,916 shares of the Common Stock of the Union Explosives Corporation.

XXVIII.

Subsequent to October 7, 1930, pursuant to the authorization of the Board of Directors of the Peerless-Union Explosives Corporation, that Corporation delivered to the First National Bank of Tamaqua, the sum of $38,600 in cash, this sum to be used in the acquisition of 1544 shares of the Preferred Stock of the Peerless Explosives Corporation and 602 shares of the Common Stock of the Peerless Explosives Company, these shares representing all of the issued capital stock of the Peerless Explosives Company remaining outstanding after October 7, 1930.

On or about October 15, 1930 the Peerless-Union

Explosives Corporation delivered to the First National Bank of Tamaqua the sum of $1,455, such sum to be used in the same manner and for the same purposes as the sum of $38,600, previously hereinbefore referred to.

XXIX.

Between October 15, 1930 and December 31, 1930 the First National Bank of Tamaqua, pursuant to the direction of the Peerless-Union Explosives Corporation, paid to the owners of the 1544 shares of the Preferred Stock of the Peerless-Union Explosives Corporation and the owners of the 602 shares of the Common Stock of the Peerless Explosives Company (comprising 26 individual stockholders in all), the total sum of $39,955.00, (the sum of $100.00 being returned by the First National Bank of Tamaqua to the Peerless-Union Explosives Corporation) and at the same time delivered to the owners of the 1,544 shares of the Preferred Stock of the Peerless Explosives Company and the owners of the 602 shares of the Common Stock of the Peerless Explosives Company 301 shares of the common stock of the Peerless-Union Explosives Corporation. Of the said 26 holders of the common and preferred stock of the Peerless Explosives Company, two received all cash.

XXX.

On January 5, 1931 the Board of Directors of the Peerless Explosives Company authorized, directed and empowered its proper officials to mark cancelled the note of Peerless-Union Explosives Corporation dated October 7, 1930, drawn to the order

of the Peerless Explosives Company in the sum of $1,036,800 and deliver the same to Peerless-Union Explosives Corporation in exchange for certificates for all of the outstanding preferred and common stock of Peerless Explosives Company duly endorsed for transfer.

XXXI.

On October 21, 1930 the Board of Directors of the Union Explosives Company authorized, instructed and directed the proper officials of the Company to mark cancelled the note of the Peerless-Union Explosives Corporation to the order of the Union Explosives Company in the sum of $871,750.00 and to deliver the same to Peerless-Union Explosives Corporation in exchange for certificates for all of the outstanding preferred and common stock of Union Explosives Company duly endorsed for transfer.

XXXII.

Subsequent to January 5, 1931 the note of the Peerless-Union Explosives Corporation in the sum of $1,036,800 was surrendered by the Peerless Explosives Company and duly cancelled.

XXXIII.

Subsequent to October 21, 1930 the note of the Peerless-Union Explosives Corporation in the sum of $871,750.00 was surrendered by the Union Explosives Company and duly cancelled.

XXXIV.

At the close of October 7, 1930 there were issued

and outstanding 21,732 shares of Preferred Stock of Peerless Union Explosives Corporation, all of which were owned by the Atlas Powder Company, and 59,343.79 shares of the Common Stock of the Peerless-Union Explosives Corporation. Of said 59,343.79 shares of the Common Stock of the Peerless-Union Explosives Corporation 32,198 shares were issued to the Atlas Powder Company and 27,145.79 shares of the Common Stock of the Peerless-Union Explosives Corporation to the former stockholders of Peerless Explosives Company and Union Explosives Company. Not included in the above was a certificate of 2500 shares of the Common Stock of Peerless-Union Explosives Corporation issued to H. K. Seligman and a certificate for a like amount of Peerless Union Explosives Corporation Common Stock issued to W. E. Fletcher, which certificates were dated October 7, 1930.

XXXV.

Between October 7 and December 31, 1930 there was issued 673.27 additional shares of the Common Stock of Peerless-Union Explosives Corporation in connection with the acquisition of 602 shares of the Common Stock and 1544 shares of the Preferred Stock of the Peerless Explosives Company.

XXXVI.

Attached hereto, marked Exhibit "Q" and made a part hereof by reference is a true copy of a Specimen Certificate of the Cumulative Preferred Stock of Peerless-Union Explosives Corporation.

XXXVII.

Exhibit "R" is the original income tax return filed by Petitioner for the year 1930.

XXXVIII.

Respondent overstated Petitioner's taxable income in the amount of $700.00, representing the cash received from the disposition of 28 shares of Preferred Stock of the Peerless Explosives Company which taxpayer reported in Schedule "C" of his return.

XXXIX.

Exhibit "S" is the correct statement of the sales of Atlas Powder Company Common and Preferred Stock on the New York Stock Exchange during the period September 6, 1930 to November 7, 1930, inclusive, showing the number of shares traded in each day and the high, low and closing prices thereof and the bid and asked price.

XL.

Of the 2541 shares of the Common Stock of the Peerless Explosives Company owned by Petitioner on October 7, 1930, he acquired 2500 in 1922 for services rendered and formulas conveyed to the Peerless Explosives Company. 25 shares were acquired through miscellaneous odd lot purchases between 1922 and 1927 and the balance, or 16 shares, were acquired by purchase on July 30, 1930.

XLI.

Petitioner was not a dealer in securities and the

stock was not held by him primarily for sale in the course of his trade or business.

XLII.

Petitioner in returning his taxable income for the year 1930 made no capital deductions and claimed no capital losses.

XLIII.

Of the 2,541 shares of Peerless-Union Explosives Corporation Common Stock owned by Petitioner prior to October 7, 1930 he actually exchanged 2534.38 shares of said stock in consideration for 1344 shares of Common Stock of Atlas Powder Company and 625 shares of Preferred Stock of Atlas Powder Company, 2,720.08 shares of Common Stock of Peerless-Union Explosives Corporation and $25,306.67 in cash. The remaining 6.62 shares of Peerless Explosives Company Common Stock were transferred by Petitioner as set forth in Paragraph XXI herein.

XLIV.

Exhibit "T" attached hereto and made a part hereof by reference consists of photostatic copies of eight original journal entry vouchers of Peerless-Union Explosives Corporation showing how the various steps in the acquisition by said Corporation of the assets of the Peerless Explosives Company, Black Diamond Powder Company and the Union Explosives Company were recorded on the books of original entry of the Peerless Union Explosives Corporation.

XLV.

On October 7, 1930 H. K. Seligman and W. E. Fletcher were elected President and Secretary and Treasurer, respectively, of the Peerless Explosives Company.

XLVI.

On October 7, 1930 H. K. Seligman and W. E. Fletcher were elected President and Secretary and Treasurer, respectively, of the Union Explosives Company.

WALTER G. MOYLE,
STANLEY SUYDAM,
Counsel for Petitioner.

ROBERT H. JACKSON,
Assistant General Counsel,
Bureau of Internal
Revenue.

EXHIBIT "A"

SPECIAL DIRECTORS' MEETING

Minutes of Special Meeting of the Board of Directors of Atlas Powder Company held at the offices of the Company, Room 734, Delaware Trust Building, Wilmington, Delaware, on Thursday, October 2, 1930, at 3:00 o'clock in the afternoon, pursuant to call by the President and Waiver of Notice signed by all the Directors, hereto attached, the purpose of said meeting being to consider the invest-

ment in the Capital Stock of Peerless-Union Explosives Corporation and such other business as may properly come before the meeting.

Present:

Leland Lyon

Isaac Fogg	Leonard Richards, Jr.
C. F. Backus	E. W. Moorhouse
John W. Mathews	J. F. VanLear
E. W. Maynard	Charles Warner

Absent:

Ernest duPont
W. T. Penniman

Mr. Leland Lyon, President of the Company, presided at the meeting with Mr. Isaac Fogg, Secretary, present and acting.

Upon motion, reading of the minutes of the previous meeting of the Board of Directors was waived.

The secretary reported that after informal conferences with various officers and members of the Board of Directors, the executive officers of the Company, under the terms and conditions of a certain plan of reorganization, have caused the formation, under the laws of Delaware, of a subsidiary corporation under the name Peerless-Union Explosives Corporation, for the carrying on of the lawful business of this Company, and extensions thereof, through the acquisition of all the assets of the Peerless Explosives Company, a Corporation of the State of Delaware, all the assets of Black Diamond Powder Company, a Corporation of the State of Pennsylvania, and all the assets of the Union Explosives Company, a Corporation of the State of

West Virginia, subject to the outstanding liabilities of said corporations, and that all of the issued and outstanding stock of said subsidiary is now held by Atlas Powder Company.

Upon motion duly made and seconded, the following resolution was unanimously adopted:

> RESOLVED, that the action of the executive officers of the Company in causing the formation, under the terms and conditions of a certain plan of reorganization, of a subsidiary corporation entitled Peerless-Union Explosives Corporation, for the purpose of carrying on the lawful business of this corporation, and the extensions thereof, through the purchase of all the assets of Peerless Explosives Company, Black Diamond Powder Company and Union Explosives Company, be, and the same is hereby ratified and approved.
>
> FURTHER RESOLVED, that in furtherance of said plan for the carrying on of the business of this Company, and the extensions thereof, this Board approves the acquisition by said Peerless-Union Explosives Corporation of all the assets of Peerless Explosives Company, a Corporation of the State of Delaware, all the assets of Black Diamond Powder Company, a Corporation of the State of Pennsylvania, and all the assets of Union Explosives Company, a Corporation of the State of West Virginia, subject to their existing liabilities and for that purpose thereby authorizes the proper officers of this Company to invest in the capital stock of said Peerless-Union Explosives Corporation up

to an aggregate of 21,732 shares of the 6% Cumulative Preferred Stock of said Company and 32,198 shares of its Common Stock, and in consideration therefor to deliver to Peerless-Union Explosives Corporation, or upon the order of its President and Treasurer, the following:

(a) $960,560.25 in cash.

(b) 6,318 shares of Atlas Preferred stock on the basis of $100.00 per share.

(c) 8,712-1/2 shares of Atlas Common Stock on the basis of $66-2/3 per share.

said Preferred and Common Stock to be represented at time of settlement by temporary receipts.

FURTHER RESOLVED, that Atlas Powder Company, as the holder of all the stock of Peerless-Union Explosives Corporation, now outstanding, hereby consent to the issuance by Peerless-Union Explosives Corporation of said 21,732 shares of 6% Cumulative Preferred Stock and 32,198 shares of Common Stock, and further to the issuance by said Peerless-Union Explosives Corporation of such additional amount of its authorized Common Stock not exceeding, however, 5,500 shares to Harry K. Seligman and W. E. Fletcher, on account of such part of the purchase price payable to them in the course of the acquisition of the shares of Peerless Explosives Company, Black Diamond Powder Company, and Union Explosives Company, as is payable in the stock of said Peerless-Union Explosives Corporation.

FURTHER RESOLVED, that the President

and Treasurer be, and they are hereby authorized and directed to take all other steps necessary to carry this resolution into effect.

The Treasurer advised the Board that Atlas Powder Company owns at this time 4,854 shares of its own Common Stock, and recommended that 4,851-1/4 of said shares be exchanged for a like number of shares of Common Stock of Atlas Powder Company represented by temporary Receipts for Common Stock to be issued under date of October 7, 1930, and that the exchange be bookkeeped upon the basis of the average cost per share of $85.89, stating that after using 4,851-1/4 shares in exchange as above, there would be required to be issued 3,861-1/4 shares of Common Stock, as original issue stock, to complete the exchange of Temporary Receipts then left outstanding. The total issued Common Capital Stock of Atlas Powder Company would then be 265,300 shares.

Upon motion duly made, seconded and unanimously adopted, it was

RESOLVED, that the Treasurer of this Company be, and he is hereby authorized to exchange on or after December 10, 1930, 4,851-1/4 shares of Common Stock of Atlas Powder Company, now owned by Atlas Powder Company, for a like number of shares of Common Stock represented by Temporary Receipts, and to bookkeep the exchange of said shares upon the basis of the average cost per share of $85.89;

FURTHER RESOLVED, that the proper officers of the Company be, and they are hereby

authorized to execute assignments covering the transfer and delivery of 4,851-1/4 shares of Common Stock of Atlas Powder Company, standing in the name of Atlas Powder Company, in order to carry out the provisions of the above resolution.

The Treasurer further advised that in order to provide for sufficient Preferred and Common Stock to complete the exchange of Temporary Receipts left outstanding after giving effect to the exchange of Temporary Receipts of Common Stock as per resolution immediately preceding, authority should be granted to issue, as original issue stock, 6,318 shares of Preferred Stock and 3,861-1/4 shares of Common Stock of Atlas Powder Company. Whereupon the following preamble and resolutions were upon motion, duly seconded, unanimously adopted:

WHEREAS, the amount of additional Preferred and Common Stock of Atlas Powder Company required to provide for the exchange of Temporary Receipts of Preferred and Common Stock outstanding as of November 1st and December 10, 1930, respectively, is 6,318 shares of Preferred Stock and 3,861-1/4 shares of Common Stock, therefore be it

RESOLVED, that in accordance with law and authority of Section 7, Article G, of the Certificate of Amendment of the Certificate of Incorporation of this Company, there be issued an additional amount of 6,318 shares of Preferred Stock and 3,861-1/4 shares of Common Stock if, as and when Temporary Receipts of Preferred and Common Stock, aggregating a like

number of shares are surrendered for exchange for same on and after November 1, 1930, in the case of Preferred Stock and December 10, 1930 in the case of Common Stock;

BE IT FURTHER RESOLVED, that the President or a Vice President and the Treasurer or an Assistant Treasurer, be, and they are hereby authorized to instruct the Stock Transfer Agent of this Company to issue fully paid Preferred and Common Stock certificates of Atlas Powder Company in the amounts of 6,318 shares of Preferred Stock and 3,861-1/4 shares of Common Stock in such names and amounts as may be instructed by them;

FURTHER RESOLVED, that the Stock Transfer Agent of the Company, Empire Trust Company, be, and is hereby authorized and empowered to issue Preferred Capital Stock of Atlas Powder Company up to a total amount of 96,318 shares of the par value of $100.00 each, and Common Capital Stock of Atlas Powder Company up to a total amount of 265,300 shares, without nominal or par value, upon receipt of and pursuant to instructions from the proper officers of Atlas Powder Company;

FURTHER RESOLVED, that Guaranty Trust Company of New York, Registrar, be, and they are hereby authorized and empowered to certify the C pital Stock of Atlas Powder Company up to the following total amounts:

Preferred Capital Stock up to the total amount of 96,318 shares of the par value of $100.00 each;

Common Capital Stock up to the total amount of 265,300 shares without nominal or par value.

The total amount of the authorized Capital Stock of Atlas Powder Company, by provision in its Certificate of Incorporation and Amendments thereof, is 100,000 shares of Preferred Stock of the par value of $100.00 each, a total par value of $10,000,000.00 and 500,000 shares of Common Stock, without nominal or par value. Of such authorized Common Stock 50,000 shares without nominal or par value shall be Non-Voting Common Capital Stock and 450,000 shares shall be Voting Common Capital Stock.

Upon motion, duly made, seconded and unanimously adopted, it was

RESOLVED, that application be made to the New York Stock Exchange for the listing of 6,318 additional shares of Preferred Stock and 3,861-1/4 additional shares of Common Stock of this Corporation, and that Isaac Fogg be designated by the Corporation to appear before the Committee on Stock List of said Exchange, with authority to make such changes in said application, or in any agreements relative thereto as may be necessary to conform with requirements for listing.

Upon motion, the meeting adjourned.

(SIGNED) Isaac Fogg
Secretary

(SIGNED) Leland Lyon

(SIGNED) .....

(SIGNED) John W. Mathews
(SIGNED) E. W. Maynard
(SIGNED) .....
(SIGNED) Leonard Richards, Jr.
(SIGNED) J. F. Van Lear

APPROVED:

.....

(SIGNED) W. T. Penniman

EXHIBIT "B"

REGULAR DIRECTORS' MEETING

Minutes of Regular Meeting of the Board of Directors of Atlas Powder Company, held at the offices of the Company, Room 734, Delaware Trust Building, Wilmington, Delaware, on Wednesday, December 3, 1930, at 3:00 o'clock in the afternoon.

Present:

Leland Lyon

C. F. Backus	E. W. Moorhouse
Ernest duPont	W. T. Penniman
Isaac Fogg	Leonard Richards, Jr.
John W. Mathews	J. F. VanLear
E. W. Maynard	Charles Warner

Mr. Leland Lyon, President of the Company, presided at the meeting with Mr. Isaac Fogg, Secretary, present and acting.

Upon motion, reading of the minutes of the previous meeting of the Board of Directors was waived.

The Secretary stated that there were no items of unfinished business.

NEW BUSINESS

Minutes of Executive Committee meetings of November 7th, 10th, 12th, 20th, 26th and December 3rd were read; and, upon motion, duly made, seconded and unanimously adopted, it was

> RESOLVED, that the Board of Directors hereby approves the action of the Executive Committee in authorizing the following projects:
>
> Project A-3056, Part II, Giant Works, $1,776.09, covering repairs to wharf.
>
> Part I of this Project amounted to $2,484.00, Part II, $1,776.09, total authorized $4,260.09
>
> Project dated November 21, 1930, Stamford Works, $29,500.00, covering advertising, 1931.

Upon motion, duly made, seconded and unanimously adopted, it was

> RESOLVED, that the Board of Directors hereby approves the recommendation of the Executive Committee that an offer of Preferred Stock only be made to employees for subscription for the year 1931, the price at which the stock is to be offered to be $100.00 per share, the offer in other respects to be in accordance with the terms and conditions enumerated in Report Secretary's No. 3859. No offering of Common Stock to employees for subscription will be made until general conditions have become more stabilized. The Executive Committee was au-

thorized to determine the maximum number of shares of Preferred Stock to be allotted on subscriptions received under the 1931 offer.

RESOLVED, that the action of the Officers of the company in effecting settlement of all claims of Henry Doherty Silk Company for the sum of $20,000.00, and the delivery to Atlas Powder Company of 3,000 shares Preferred Stock and 6,000 shares Common Stock of Napon Rayon Corporation, representing the entire holdings of Henry Doherty Silk Company, as well as the policy to be followed in the liquidation of the Napon Rayon Corporation, be and the same are hereby ratified and approved.

RESOLVED, that the recommendation of the Executive Committee to the effect that the total amount of Common Stock now in the Treasury, 7,707 shares, be applied to the exchange of Temporary Receipts issued in connection with the Peerless-Union deal and that an additional amount of 1,005 shares be purchased in the open market to complete the exchange of the entire amount of 8,712 shares represented by Temporary Receipts issued in connection with the Peerless-Union deal, making unnecessary the issuance of any Original Issue Stock for this purpose, be and the same is hereby ratified and approved;

FURTHER RESOLVED, that the proper Officers of this Company are hereby authorized to make application to the New York Stock Exchange for cancellation of authority heretofore granted by the New York Stock Exchange for

the listing of 3,861 shares of its Common Stock without par value, pursuant to listing application A-9597 dated October 14, 1930.

Upon motion, duly made, seconded and unanimously adopted, it was

RESOLVED, that the Board of Directors hereby approves all of the proceedings of the Executive Committee meetings held on November 7th, 10th, 12th, 20th, 26th and December 3rd, 1930, subject to the foregoing actions taken by this Board upon specific subjects.

The Treasurer submitted report showing details of settlement made October 7, 1930 in re merger of Peerless Explosives Company and Union Explosives Company, which was accepted and ordered filed.

In connection with the failure of the Holston-Union National Bank, Mr. Warner asked what methods were used to check up the condition of the various banks in which the company carries deposits. Mr. Fogg reported that a list of all banks is submitted periodically to The National City Bank of New York for rating.

Mr. W. T. Penniman, General Manager Explosives Department, reported verbally on general conditions and prospects in the Explosive Department.

Mr. E. W. Moorhouse reported verbally on general conditions and prospects in the Cellulose Products Department.

Upon motion, the meeting adjourned.

(SIGNED) Isaac Fogg
SECRETARY
(SIGNED) Leland Lyon

(SIGNED) .....
(SIGNED) .....
(SIGNED) John W. Mathews
(SIGNED) E. W. Maynard
(SIGNED) E. W. Moorhouse
(SIGNED) W. T. Penniman
(SIGNED) Leonard Richards, Jr.
(SIGNED) J. F. Van Lear
(SIGNED) .....

EXHIBIT "C"

MEMORANDUM OF AGREEMENT dated the 7th day of October, one thousand nine hundred and thirty (1930), between R. I. BASHFORD, E. FROST, of Philadelphia, Pennsylvania, and EDWARD R. DAY, of White Haven, Pennsylvania, (hereinafter referred to as the "Stockholders"), parties of the first part, and H. K. SELIGMAN, of Tamaqua, Pennsylvania and W. E. FLETCHER, of Philadelphia, Pennsylvania (hereinafter referred to as the "Promoters"), parties of the second part.

WHEREAS, Stockholders are the owners of a majority of the outstanding stock of the Peerless Explosives Company (hereinafter described as "Peerless") and desire to exchange the same under the terms and conditions of a certain Plan of Reorganization as hereinafter set forth, and Promoters desire to acquire the same:

NOW, THEREFORE, in consideration of the mutual covenants herein contained, this agreement

WITNESSETH:

I—Stockholders hereby warrant to the Promoters:

(1) That the Peerless Explosives Company is a corporation duly organized and existing under the laws of the State of Delaware with an authorized capital stock consisting of 40,000 shares of Preferred Stock of the par value of $25 each and 15,000 shares of Common Stock of no par value, of which 17,672 shares of Preferred Stock and 14,890 shares of Common Stock respectively are now issued and outstanding;

(2) That they personally own or control 8500 shares of said Common Stock;

(3) That the funded debt of Peerless consists of a mortgage bearing date May 19, 1927, to the Dime Bank Title and Trust Company of Wilkes-Barre, Pennsylvania, Trustee, to secure a note payable to bearer for $147,000.00, interest on said note being paid to May 19, 1930; also a mortgage given by Black Diamond Powder Company, dated July 31, 1925, to secure a bond in the sum of $133,000., the balance due thereon being $60,000. with the interest paid to August 1, 1930;

(4) That Black Diamond Powder Company (hereinafter described as "Black Diamond"), is a corporation organized under the laws of the State of Pennsylvania, having an authorized capital stock of 2,500 shares of the par value of $100 each, of which amount there is issued and outstanding 1,584 shares, all of which shares of capital stock Peerless owns or controls;

(5) That the balance sheet attached hereto, made

a part hereof and marked Exhibit "A" correctly sets forth the financial condition (including all known contingent liabilities) of Peerless and Black Diamond, as of December 31, 1929, and includes, in the judgment of Stockholders, adequate allowance or reserve for depreciation, doubtful accounts, inventory shrinkage and all income and other taxes accrued at the date thereof;

(6) That since December 31, 1929, there has not been any change in the authorized or outstanding capitalization of Peerless or Black Diamond, or any change in its financial condition from that set forth in said balance sheet, except such changes as may have occurred in the ordinary and regular conduct of its business, and that no dividends have been paid or declared subsequent to January 15, 1930;

(7) That at the date of settlement hereunder, the financial condition of Peerless and Black Diamond will be at least as good and their respective net worth at least as great as that set forth in said Exhibit "A", plus net earnings accumulated since December 31, 1929, explosions, Acts of God and the said dividend of January 15, 1930 excepted, and that no dividends will be paid or declared and no salaries paid except current salaries, subsequent to the date of this agreement;

(8) That the earnings statement attached hereto, made a part hereof and marked Exhibit "B" is a true and correct statement of the sales and earnings of Peerless and Black Diamond for the year ended December 31, 1929;

(9) That Peerless and Black Diamond own in fee simple all of their real estate and fixed assets free

and clear of all liens and encumbrances, save only the mortgages referred to in sub-division (3) of this Paragraph I;

(10) That Peerless and Black Diamond have no commitments or liabilities for salaries or for purchases or sales not shown on the said balance sheet, except those incurred in the ordinary course of business, and that they have no such commitments or liabilities incurred in the ordinary course of business which by their terms will remain in force beyond three (3) months from the date hereof, except contracts shown in Exhibit "C" attached hereto, and further that there are no suits pending or threatened against the company, except actions now pending brought in the Circuit Court of Floyd County, State of Indiana, by E. P. Noe, E. L. Noe and Sallie Noe growing out of an explosion which occurred on August 17, 1929, near New Albany, Indiana, the aggregate amount of plaintiffs' claims, as shown by Complaint filed, being $7,000. An action has also been entered in the Circuit Court of Jefferson County, Kentucky, by the same plaintiffs in the same cause of action, the amount claimed in the action brought in Kentucky being $3,000.

II—Promoters warrant that Peerless-Union Explosives Corporation (hereinafter referred to as the "New Company") is a corporation duly organized and existing under the laws of the State of Delaware, for the purpose of acquiring the assets of Peerless, Black Diamond and of the Union Explosives Company (hereinafter described as "Union"), a corporation organized and existing under the laws of the State of West Virginia, subject to their several liabilities as the same appear at the close of

business on the sixth day of October, 1930, all in accordance with the said Plan of Reorganization.

Promoters further warrant that upon the conclusion of the acquisition of the assets of Peerless, Black Diamond and Union, as herein contemplated, New Company will be the owner of all the assets of said Peerless, Black Diamond and Union, subject only to their several liabilities, as the same appear at the close of business on the sixth day of October, 1930, and will have a cash working capital of at least $300,000. and that, upon the completion of such transfers and of the underwriting hereinafter provided for, New Company will have an authorized capital of 150,000 shares represented by 50,000 shares of 6% Preferred Cumulative Stock (non-voting except under certain specified conditions), with the par value of $100 each, and 100,000 shares of Common Stock without nominal or par value, of which there will be outstanding 21,732 shares of Preferred Stock and 65,000 shares of Common Stock.

Promoters further agree that they will cause such corporate action to be taken by Peerless, Black Diamond, Union and New Company as may be necessary to effect the liquidation of the three former companies, or the transfer of their assets, subject to their liabilities, and the acquisition thereof by New Company.

III—Promoters warrant that Atlas Powder Company (hereinafter referred to as "Atlas") is a corporation duly organized and existing under the laws of the State of Delaware with an authorized capital of 600,000 shares, of which 100,000 shares of the par value of $100 each is Preferred Cumulative

Stock and 500,000 shares without nominal or par value is Common Stock; that of such authorized capital there is now issued and outstanding 90,000 shares of Preferred Cumulative Stock and 261,438-3/4 shares of Common Stock.

IV—Stockholders and Promoters respectively agree that Stockholders shall deliver to Promoters their entire holdings of Peerless, viz: 8,500 shares of Common Stock in exchange for 9,000 shares of the Common Stock of New Company and $595,000, of which $125,000 shall be represented by cash and the balance by the delivery of 2,225 shares of the Preferred Cumulative Stock of Atlas, which shall be accepted by Stockholders at the par value thereof, and 3,712-1/2 shares of the Common Stock of Atlas which shall be accepted by Stockholders at a price of $66.66-2/3 per share.

Stockholders hereby agree to accept at settlement temporary receipts for the Preferred and Common Stock of Atlas hereinabove provided bearing dividends at the rate of six per cent and $4 respectively per share per annum, and convertible into permanent certificates on and after the next respective dividend payment dates upon such stock. Dividends upon such temporary receipts shall be adjusted at the time of conversion.

As additoinal consideration for the exchange of said Peerless stock by Stockholders, Promoters agree to cause New Company to reimburse Stockholders for Federal Income Tax paid by them upon the profit accruing from the proposed reorganization as herein provided. Provided, however, that the aggregate amount to which the Stockholders shall be entitled to reimbursement shall under no

circumstances exceed the sum of $74,375. And provided, further, that Stockholders' Federal Income Tax Returns for the year 1930 shall be prepared under the supervision of Messrs. Barrow, Wade, Guthrie & Co., Public Accountants, who shall also represent Stockholders at the audit of said returns and at all conferences and hearings thereon.

V—Promoters agree to use their best efforts to cause the exchange of all of the outstanding Preferred Stock of Peerless, i. e. 17,672 shares of the par value of $25 each, for the sum of $25 per share, and an amount of Common Stock of New Company not to exceed in the aggregate 4,000 shares.

Promoters also agree to use their best efforts to cause the exchange of all of the outstanding minority Common Stock of Peerless, i. e. 6,390 shares, upon the basis of one-half share of Common Stock of New Company for each share of Peerless Common Stock.

VI—Promoters hereby warrant that they will cause the underwriting by Atlas of 21,732 shares of Preferred Stock and 32,198 shares of Common Stock of New Company in consideration for such amount of cash and securities of Atlas as may be necessary to effect the proposed reorganization and acquisition of all of the assets of Peerless, Black Diamond and Union, under the terms and conditions herein set forth, and to retain a cash working capital of $300,000.

VII—Stockholders agree that upon the completion of the exchange of their stock in the manner hereinbefore set forth, they will furnish Promoters with the resignations of all officers and directors of Peerless and Black Diamond.

VIII—Stockholders will cause Peerless and Black Diamond to give Promoters, their attorneys, accountants, appraisers and other agents full and complete access to their records and books of account in order that they may verify the accuracy of the warranties hereinbefore set forth in Paragraph I of this agreement and the Exhibits attached hereto.

IX—Settlement under this agreement shall be made not later than the seventh day of October, A. D. 1930.

X—All documents, titles, proceedings and other legal matters pertaining to the transactions provided for under this agreement shall be prepared by and/or be subject to the approval of Promoters' counsel, Messrs. Montgomery and McCracken, 1421 Chestnut Street, Philadelphia, Pennsylvania. The cost of all legal examinations and audits shall be defrayed by Promoters.

THIS AGREEMENT shall bind and inure to the benefit of the parties hereto, their respective executors, administrators and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year aforesaid.

R. I. Bashford	(SEAL)
E. Frost	(SEAL)
Edward R. Day	(SEAL)
H. K. Seligman	(SEAL)
W. E. Fletcher	(SEAL)

Signed, Sealed and Delivered)
:
in the presence of)
Lucien B. Carpenter

EXHIBIT "A"

PEERLESS EXPLOSIVES CO.

Final Balance Sheet——————December 31, 1929

ASSETS

1.	Real Estate, R. R. & Franchises	59,265.27	
2.	Plant Buildings	104,768.91	
3.	Pipe Lines	23,244.13	
4.	Furniture & Fixtures	4,599.15	
5.	Machinery & Equipment	129,135.58	
6.	Construction Accts.	11,601.91	
7.	Trucks, Etc.	37,424.81	
10.	Magazines	8,034.41	
		378,074.17	
L.	Less Reserve for Depreciation	120,173.04	257.901.13

8.	Cash		14,537.14	
9.	Accts. Receivable, Trade	257,176.59		
I.	Less Frt. Allowance	3,655.07	254,121.52	
11.	Accts. Receivable, Other		1,727.35	
14.	Notes	41,284.77		
K.	Less Notes " Disctd.	5,000.00	36,284.77	
25.	Trade Accep. Rec.	9,329.82		
R.	Less T. A. " Disctd.	6,499.41	2,830.41	
13.	Due from Employees		10,591.34	320,092.53
15.	Dynamite & Supplies		79,959.03	
16.	Raw Materials		47,170.41	
17.	Containers Returnable		716.00	127,845.44
18.	Deferred Charges			2,984.49
19.	Int. in Black Dia. Pdr. Co.			32,568.81

20.	Investments		2,800.00
21.	Good Will & Org. Expense		67,958.60
26.	Treasury Stock		7,525.00
			819,676.02

LIABILITIES

A.	Accts. Payable, Trade	101,810.19	
B.	" " Other	.....	
C.	Notes	166,325.99	
D.	Due Employees	450.16	
E.	Trade Accep. Payable	15,238.27	
O.	Accrued Expense	5,884.33	289,708.94
P.	Accrued Credits		368.00
F.	Capital Stock, Pref.	1,000,000.00	
24.	Less Unissued	551,000.00	449,000.00

G.	Paid in Surplus	661.00
M.	Reserve for Explosions	15,840.44
N.	" " Bad Debts	16,004.62
S.	Surplus	48,093.02
		819,676.02

(Pencil marking in lower left-hand corner)—M. P. C J W

EXHIBIT "A"

BLACK DIAMOND POWDER CO.

Final Balance Sheet————————December 31, 1929

ASSETS

1.	Real Estate, Rds., Etc.	6,783.32

2.	R. R. Siding & Trestle	8,407.06		
3.	Buildings	62,383.55		
4.	Machinery & Equipment	79,863.99		
5.	Furniture & Fixtures	539.92		
6.	Autos & Trucks	822.18		
19.	Horses & Wagons	404.00	159,204.02	
L.	Less Reserve for Dep.		59,655.16	99,548.86
7.	Cash		1,315.49	
8.	Accts. Receivable Trade	2,732.60		
K.	Less Frt. Allowance	895.73	1,836.87	
9.	Accts. Receivable Other		310.79	
17.	Notes Receivable	7,198.30		
H.	Less Notes " Endorsed	1,000.00		
M.	" " " Disctd.	6,198.30		3,463.15
11.	Raw Materials		19,338.36	

12.	Finished Powder	36,841.29	
13.	Containers Returnable	142.02	56,321.67
14.	Deferred Charges		1,597.84
			160,931.52

LIABILITIES

A.	Mortgage		75,000.00
B.	Accts. Payable, Trade	11,153.44	
C.	Accts. Payable, Other	4,821.97	
D.	Notes Payable	37,920.85	
F.	Trade Accept. Payable	2,379.12	54,275.42
E.	Capital Stock	250,000.00	
10.	Less Capital Stock Unissued	224,600.00	25,400.00
I.	Accrued Expense	6,468.74	

J.	Accrued Credits	1,007.99	7,476.73
16.	Surplus		*11,934.93
O.	Reserve for Explosions		10,714.30
G.	Sales	.....	
15.	Less Cost of Sales	.....	.....
			160,931.52

(Pencil markings in lower left-hand corner)—VFW J. L. L.

* RED.—(Printed in pencil following this figure.)

EXHIBIT "B"

PEERLESS EXPLOSIVES CO.

P. & L. Dynamite & Accessories, Twelve Months Ending Dec. 31, 1929.

	Quantity	Total Sales	Cost of Sales	Gross Profit
Dynamite	8,726,328	1,063,893.22	724,398.23	339,494.99
Fuse	9,272,103	78,903.18	66,971.51	11,931.67
Caps	1,784,300	22,193.02	17,400.81	4,792.21
E. B'S.	2,476,693	150,300.73	121,716.38	28,584.35
Misc. Goods	.....	6,459.61	5,581.07	878.54
Black Powder	162,980	264,103.52	260,481.97	3,621.55
Pellet Powder	204,850	16,429.60	14,749.99	1,679.61
By Products	.....	2,250.00	.....	2,250.00
		1,604,532.88	1,211,299.96	393,232.92

Other Income			14,136.89
			407,369.81

EXPENSES

Admin. & Overhead	14,575.00	
Advertising	4,471.90	
Taxes	1,708.94	
Insurance	119.63	
Interest	10,554.44	
Gen. Expenses	7,732.83	
Office "	5,799.95	
" Payroll.	8,187.80	
Disct. on Sales	7,597.00	
Rent	2,963.32	
Legal Expenses	997.00	
Magazine "	1,411.74	
" Adjustment Exp.	252.55	
Less on Sale of Trucks	736.01	67,108.11

		108,354.05	
Sales Expense		40,947.76	
Frt. on Sales		33,315.21	249,725.13
Drayage(			
(Birmingham	246.58	Net	157,644.68
Bluefield	675.49	Before deductions for depreciation	
Carnegie	3,570.96	Reserves for bad debts etc.	
Capels	389.65	G. P. Teal	
Evarts	44.04	asst Treas.	
Fostoria	1,578.06	JU/EC	
New Albany	258.63		
Osage	271.45		
Petersburg	171.00		
W. Haven	26,109.38		
	33,315.21		

EXHIBIT "B"

BLACK DIAMOND POWDER COMPANY

Profit & Loss Statement——December 1929.

		Total Sales	Cost of Sales	Gross Profit
Black Powder	20104	31567.20	20,903.37	10663.83
Rifle Powder	127	590.25	285.75	304.50
Cartridges	2500	125.00	50.00	75.00
Soda Bags	66	346.48		346.48
		32,628.93	21,239.12	11,389.81
Administration & Overhead		450.00		
Discounts		586.51		
Freight On Sales		368.99		
Interest		452.52		

Insurance				
Office Expense		152.17		
Sales Expense		759.49		
Trucking		1115.76		
Taxes		175.00		
General Expense		918.80		
Idle Mill Expense		125.60		
Rent		27.24		5,132.08
			Net Profit	6,257.73

*—(Crossed out on original.)

Profit and Loss Twelve Months, Ending December 31, 1929.

Black Powder	183,450	293,445.64	199,717.30	93,728.34
Rifle Powder	9,718	33,898.86	23,354.25	10,544.61
Cartridges	19,200	532.50	285.00	247.50
Soda Bags		346.48		346.48
		328,223.48	223,356.55	104,866.93

Other Income	750.70
	105,617.63
Expenses——	
Freight Overhead, Trucking Selling, etc.,	58,010.82
Net Profit	47,606.81

Before deduction for depreciation and reserves for bad debts etc.

Checked—JU V J W

G. P. Teal
Asst. Treas.

EXHIBIT "D"

MEMORANDUM OF AGREEMENT dated the 7th day of October, A. D. 1930, between J. EDGAR LONG, of Clarksburg, West Virginia (hereinafter referred to as the "Stockholder"), party of the first part, and H. K. SELIGMAN, of Tamaqua, Pennsylvania, and W. E. FLETCHER, of Philadelphia, Pennsylvania (hereinafter referred to as the "Promoters"), parties of the second part.

WHEREAS, Stockholder is the owner of a majority of the outstanding stock of the Union Explosives Company (hereinafter referred to as "Union") and desires to exchange the same under the terms and conditions of a certain Plan of Reorganization as hereinafter set forth, and Promoters desire to acquire the same:

NOW, THEREFORE, in consideration of the mutual covenants herein contained, this agreement

WITNESSETH:

I—Stockholder hereby warrants to the Promoters:

(1) That the Union Explosives Company is a corporation duly organized and existing under the laws of the State of West Virginia with an authorized capital stock consisting of 5,000 shares of Preferred Stock of the par value of $100 each, and 5,000 shares of Common Stock without nominal or par value, of which 3,367-1/2 shares of Preferred Stock and 4,044 shares of Common Stock respectively are now issued and outstanding;

(2) That he personally owns or controls 2,198 shares of said Preferred Stock and 2,824 shares of said Common Stock;

(3) That the funded debt of Union consists of two mortgages aggregating the principal sum of $13,600.00.

(4) That the balance sheet attached hereto, made a part hereof and marked Exhibit "A" correctly sets forth the financial condition (including all known contingent liabilities) of Union, as of December 31, 1929, and includes adequate allowance or reserve for depreciation, doubtful accounts, inventory shrinkage and all income and other taxes accrued at the date thereof;

(5) That since December 31, 1929, there has not been any change in the authorized or outstanding capitalization of Union, or any change in its financial condition from that set forth in said balance sheet, except such changes as may have occurred in the ordinary and regular conduct of its business, and that no dividends have been paid or declared subsequent to December 31, 1929.

(6) That at the date of settlement hereunder, the financial condition of the company will be at least as good and its net worth at least as great as that set forth in said Exhibit "A", and that no dividends will be paid or declared and no salaries paid except current salaries, subsequent to the date of this Agreement;

(7) That the earnings statement attached hereto, made a part hereof and marked Exhibit "B" is a true and correct statement of the sales and earnings of Union for the year ended December 31, 1929;

(8) That Union owns in fee simple all of its real estate and fixed assets free and clear of all liens and encumbrances, save only the mortgages referred to in sub-division (3) of this Paragraph I;

(9) That Union has no commitments or liabilities for salaries or for purchases or sales not shown on the said balance sheet, except those incurred in the ordinary course of business, and that it has no such commitments or liabilities incurred in the ordinary course of business which by their terms will remain in force beyond three (3) months from the date hereof; and further that there are no suits pending or threatened against the company.

II—Promoters warrant that Peerless Union Explosives Corporation (hereinafter referred to as the "New Company") is a corporation duly organized and existing under the laws of the State of Delaware, for the purpose of acquiring the assets of Union, of Peerless Explosives Company (hereinafter referred to as "Peerless"), a corporation organized and existing under the laws of the State of Delaware, and of Black Diamond Powder Company (hereinafter referred to as "Black Diamond"), a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, subject to their several liabilities as the same appear at the close of business on the sixth day of October, A. D. 1930, all in accordance with said Plan of Reorganization.

Promoters further warrant that upon the conclusion of the acquisition of the assets of Union, Peerless, and Black Diamond, as herein contemplated, New Company will be the owner of all the assets of said Union, Peerless and Black Diamond, subject only to their several liabilities, as the same ap-

pear at the close of business on the 6th day of October, 1930, and will have a cash working capital of at least $300,000. and that, upon the completion of such transfers and of the underwriting hereinafter provided for, New Company will have an authorized capital of 150,000 shares represented by 50,000 shares of 6% Preferred Cumulative Stock (non-voting except under certain specified conditions) with the par value of $100 each, and 100,000 shares of Common Stock without nominal or par value, of which there will be outstanding 21,732 shares of Preferred Stock and 65,000 shares of Common Stock.

Promoters further agree that they will cause such corporate action to be taken by Union, Peerless, Black Diamond and New Company as may be necessary to effect the liquidation of the three former companies, or the transfer of their assets subject to their liabilities, and the acquisition thereof by New Company.

III—Promoters warrant that Atlas Powder Company (hereinafter referred to as "Atlas") is a corporation duly organized and existing under the laws of the State of Delaware with an authorized capital of 600,000 shares, of which 100,000 shares of the par value of $100 each is Preferred Cumulative Stock and 500,000 shares without nominal or par value is Common Stock; that of such authorized capital there is now issued and outstanding 90,000 shares of Preferred Cumulative Stock and 261,438-3/4 shares of Common Stock.

IV—Stockholders and Promoters respectively agree that Stockholders shall deliver to Promoters 2,824 shares of Common Stock of Union in exchange

for 8,500 shares of the Common Stock of New Company and $499,591.75, represented by $333,333.33-1/3 in Common Stock of Atlas at a price of $66.66-2/3 per share, and $166,258.42 in Preferred Stock of Atlas at par.

Stockholder and Promoters also respectively agree that Stockholder shall deliver to Promoters 2,198 shares of Preferred Stock of Union in exchange for an equal amount of Atlas Preferred Stock and 802 shares of Common Stock of New Company.

Stockholder agrees to accept at settlement temporary receipts for the Preferred and Common Stock of Atlas hereinabove provided bearing dividends at the rate of six per cent and $4 respectively per share per annum, and convertible into permanent certificates on and after the next respective dividend payment dates upon such stock. Dividends upon such temporary receipts shall be adjusted at the time of conversion.

V—Promoters agree to use their best efforts to cause the exchange of the remaining 1,169-1/2 shares of Preferred Stock of Union, for a total of $93,700 in cash, 232-1/ 2 shares of Atlas Preferred Stock, and 585 shares of Common Stock of New Company.

Promoters also agree to use their best efforts to cause the exchange of all of the outstanding minority Common Stock of Union, i. e. 1,220 shares upon the basis of one share of the Common Stock of New Company for each share of Union Common Stock.

VI—Promoters hereby warrant that they will cause the underwriting by Atlas of 21,732 shares of Preferred Stock and 32,198 shares of Common

Stock of New Company in consideration for such amount of cash and securities of Atlas as may be necessary to affect the proposed reorganization and acquisition of all of the assets of Union, Peerless and Black Diamond, under the terms and conditions herein set forth, and to retain a cash working capital of $300,000.

VII—Stockholder agrees that upon the completion of the exchange of his stock in the manner hereinbefore set forth, he will furnish Promoters with the resignations of all officers and directors of Union.

VIII—Stockholders will cause Union to give Promoters, their attorneys, accountants, appraisers and other agents full and complete access to its records and books of account in order that they may verify the accuracy of the warranties hereinbefore set forth in Paragraph I of this agreement and the Exhibits attached hereto.

IX—Stockholder agrees to enter the employ of New Company upon approximately the same terms upon which he is now employed by Union, undertaking to use his best efforts in the interest of New Company, subject to the direction of its officers and directors.

X—Stockholder agrees at settlement to enter into a contract with New Company whereby he shall agree not to enter into competition with it, directly or indirectly, for a period of ten years in the United States of America.

XI—Settlement under this agreement shall be made not later than the 7th day of October, A. D. 1930.

XII—All documents, titles, proceedings and other legal matters pertaining to the transactions provided for under this agreement shall be prepared by and/or be subject to the approval of Promoters' counsel, Messrs. Montgomery and McCracken, 1421 Chestnut Street, Philadelphia, Pennsylvania. The cost of all legal examinations and audits shall be defrayed by Promoters.

THIS AGREEMENT shall bind and inure to the benefit of the parties hereto, their respective executors, administrators and assigns.

IN WITNESS WHEREOF, the parties hereto have hereunto set their several hands and seals the day and year aforesaid.

J. Edgar Long (SEAL)
H. K. Seligman (SEAL)
W. E. Fletcher (SEAL)

Signed, Sealed and Delivered)
:
in the presence of)
(Illegible)
Lucien B. Carpenter.

EXHIBIT "A"

UNION EXPLOSIVES COMPANY,
CLARKSBURG, WEST VIRGINIA

STATEMENT OF ASSETS & LIABILITIES
AS AT
DECEMBER 31, 1929

	Amount	Total
Assets:		
Fixed:		
Real Estate	$23,625.00	
Buildings	45,031.56	
Machinery & Equipment	226,761.30	
Reserve Machinery	18,387.04	
Railroad Siding	7,014.47	
Industrial Tracks	1,489.27	
Plant Road Improvements	1,755.76	

Attached Utility Value		28,000.00	
Magazine Buildings		52,900.23	
Automobiles & Trucks		25,522.95	
Office Furn. & Fixtures		6,525.54	
Cost of Permissibles		2,566.21	$439,579.33
Current:			
Cash in Banks	$8,455.59		
Contingent Funds	4,315.03	12,770.52	
Notes Receivable			
Accounts Receivable:		34,024.12	
Sales	373,408.57		
Sundry	39,218.43	412.627.00	
Raw Materials		72,050.15	
Finished Products		123,591.52	
Work in Process		7,632.01	662,695.32

Deferred & Prepaid:			
Interest		775.80	
Insurance		2,738.39	
Taxes		441.50	
Rent		938.37	
Auto Licenses		315.59	
Association Dues		170.02	
Deferred Charges		3,154.68	8,534.35
Total Assets			1,110,809.00
Liabilities:			
Capital Stock	463,250.00		
Less Treasury Stock	126,500.00	336,750.00	
Notes Payable		242,535.45	
Accounts Payable:			
Purchases	50,530.19		
Sundry	148,362.78	198,892.97	
Reserve for Deprec.		182,778.23	

Total Liabilities			960,956.65
Surplus			149,852.35
Surplus November 30, 1929		172,784.36	
Less Payment for 1928 Income Tax	1,868.21		
Dividend #2	31,883.42	33,751.63	139,032.73
Profit for Month of December 1929			10,819.62

EXHIBIT "B"

UNION EXPLOSIVES COMPANY
Clarksburg, West Virginia

STATEMENT OF INCOME and EXPENSES—PERIOD ENDED DECEMBER 31, 1929

Income	
Value of Production	$ 772,995.31
High Explosive Sales	1,310,546.20
Supplies Sales	311,056.45
Black Powder Sales	107,187.27
Raw Material Sales	16,550.22
Interest Earned	6,403.63
Discount on Purchases	112.43
Miscellaneous Income	268.15
	2,525,119.66
Direct Cost	
Direct Labor	59,564.26
Material used	579,658.87
Factory Overhead	133,772.18
High Explosives Cost	989,863.31
Supplies Cost	249,427.45
Black Powder Costs	90,780.25
Raw Material Costs	16,543.76
	2,119,610.08
Administrative Expenses	
Salaries	32,073.37

Office Expense	6,454.91
Traveling	11,111.09
Officers' Salaries	7,500.00
Legal Expense	625.53
Interest	8,952.78
Taxes	2,398.03
Insurance	4,860.70
Group Insurance	1,287.93
Loss—Sale Capital Assets	225.40
Bad Debts	6,228.06
Discounts Allowed	23,657.58
	104,924.58

Sales Expenses

Salaries	55,037.50
Salesmen's Expenses	17,990.42
Advertising	776.20
Commissions	57,196.49
Office Supplies & Expenses	7,915.98
Magazine Rentals	2,178.00
Magazine Bldg. & Road Repairs	401.58
Delivery Expenses	48,726.24
Depreciation	7,010.79
Inventory Adjustment	1,970.89
	199,204.09

Statement of Profit and Loss - Period ended December 31, 1929

Income	%	
Sales	1.0000	$1,745,340.14
Less: Cost of Sales	.7715	1,346,614.77

Income from Sales	.2285	398,725.37
Other Income	.0038	6,784.21
Gross Income	.2323	405,509.58
Expenses		
Administrative	.0601	104,924.58
Sales	.1141	199,204.09
Total Expense	.1742	304,128.67
Profit	.0581	101,380.91
	.2323	$ 405,509.58

EXHIBIT "E"

MEMORANDUM OF AGREEMENT dated the 7th day of October, A. D. 1930, between H. K. SELIGMAN, of Tamaqua, Pennsylvania, and W. E. FLETCHER, of Philadelphia, Pennsylvania (hereinafter referred to as "Promoters") parties of the first part, and PEERLESS-UNION EXPLOSIVES CORPORATION (hereinafter referred to as "New Company") party of the second part.

WHEREAS, Promoters own or control substantially all of the outstanding capital stock of the Peerless Explosives Company (hereinafter referred to as "Peerless"), a corporation organized and existing under the laws of the State of Delaware, and Union Explosives Company (hereinafter referred to as "Union"), a corporation organized and existing under the laws of the State of West Virginia; and

WHEREAS, Promoters and New Company desire to exchange the same under the terms and conditions hereinafter set forth, pursuant to a certain Plan of Reorganization:

NOW, THEREFORE, in consideration of the mutual covenants herein contained, this agreement

WITNESSETH:

I—Promoters and New Company respectively agree that Promoters shall cause to be delivered to New Company all of their holdings in the Preferred and Common Stock of Peerless and Union, viz: 16,128 shares of Preferred Stock of Peerless, 14,288 shares of Common Stock of Peerless, 3,367-1/2 shares of Preferred Stock of Union, and 4,044 shares of Common Stock of Union in exchange for $632,150 in cash, 6,318 shares of Preferred Stock of Atlas Powder Company (hereinafter referred to as "Atlas"), a corporation organized and existing under the laws of the State of Delaware, which Preferred Stock shall be accepted by Promoters at par, 8,712-1/2 shares of Common Stock of Atlas, at a price of $66.66-2/3 per share, and 32,145.79 shares of Common Stock of New Company.

Promoters hereby agree to accept at settlement temporary receipts for the Preferred and Common Stock of Atlas hereinabove provided bearing dividends at the rate of six per cent and $4 respectively per share per annum, and convertible into permanent certificates on and after the next respective dividend payment dates upon such stock. Dividends upon such temporary receipts shall be adjusted at the time of conversion.

As additional consideration for the exchange of

said Peerless and Union stocks by Promoters, New Company agrees to reimburse R. T. Bashford, E. Frost, and Edward Day, of Wilkes-Barre, Pennsylvania for all Federal Income Taxes imposed upon them as a result of the transfer by them to Promoters of their holdings in Peerless Explosives Company in accordance with a certain agreement dated the seventh day of October, 1930, and in pursuance of the said Plan of Reorganization. Provided, however, that the aggregate amount of such reimbursement shall under no circumstances exceed the sum of $74,375. And provided further that the Federal Income Tax Returns of the said R. T. Bashford, E. Frost and Edward Day, for the year 1930, shall be prepared under the supervision of Messrs. Barrow, Wade, Guthrie & Co., Public Accountants, who shall also represent the said taxpayers at the audit of their returns and at all conferences and hearings thereon.

III—Promoters hereby warrant that they will cause the underwriting by Atlas of 21,732 shares of Preferred Stock and 32,198 shares of Common Stock of New Company in consideration for such amount of cash and securities of Atlas as may be necessary for New Company to acquire the securities and/or assets of Peerless and Union from Promoters, as herein provided, and to retain a cash working capital of $300,000.

IV—New Company agrees that upon the receipt of said securities of Union and Peerless, it will cause such corporate action to be taken by them and by Black Diamond Powder Company, of which all of the outstanding stock is owned or controlled by Peerless, as may be necessary to effect the liquida-

tion of the three said companies, or the transfer of their assets, subject to their several liabilities, and the acquisition thereof by New Company.

V—New Company warrants that upon the completion of the acquisition by it of the assets of Peerless, Black Diamond and Union as herein contemplated, it will be the owner of all of the assets of said Peerless, Black Diamond and Union subject only to their several liabilities as the same appear at the close of business on the sixth day of October, 1930, and will have a cash working capital of at least $300,000, and that upon the completion of such transfers and of the underwriting herein provided, New Company will have an authorized capital of 150,000 shares represented by 50,000 shares of 6% Preferred Cumulative Stock (non-voting except under certain specified conditions) of the par value of $100 each, and 100,000 shares of Common Stock without nominal or par value, of which 21,732 shares of Preferred Stock and 65,000 shares of Common Stock will be outstanding.

VI—Promoters agree that upon the completion of the exchange of their stock in the manner hereinbefore set forth, they will furnish New Company with the resignation of all officers and directors of Peerless, Black Diamond and Union.

VII—Promoters agree to cause R. T. Bashford, E. Frost and J. Edgar Long to enter the employ of New Company upon approximately the same terms upon which they are now employed by Peerless and Union respectively, each undertaking to use his best efforts in the interest of New Company, subject to the direction of its officers and directors.

VIII—Promoters agree to cause R. T. Bashford, E. Frost and J. Edgar Long to enter into contracts with New Company whereby they severally agree not to enter into competition with it directly or indirectly, for a period of ten (10) years in the United States of America.

IX—Settlement under this agreement shall be made not later than the seventh day of October A. D. 1930.

X—All documents, titles, proceedings and other legal matters pertaining to the transactions provided for under this agreement shall be prepared by and/or be subject to the approval of Montgomery and McCracken, Esquires, 1421 Chestnut Street, Philadelphia, Pennsylvania. The cost of all legal examinations, audits, and so forth shall be defrayed by New Company.

THIS AGREEMENT shall bind and inure to the benefit of the parties hereto, their respective executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the individual parties hereto have hereunto set their hands and seals, and New Company has caused this agreement to be entered into on its behalf by its President, and its corporate seal to be attached hereto, attested by its Secretary, the day and year aforesaid.

Signed, sealed and delivered)
:
in the presence of)
W. E. Fletcher (SEAL)
H. K. Seligman (SEAL)

PEERLESS-UNION EXPLOSIVES CORPORATION
BY H. K. Seligman
President

(SEAL)

Attest:
W. E. Fletcher
Secretary

E. Frost
V. Pres

EXHIBIT "F"

MEMORANDUM OF AGREEMENT dated the seventh day of October, one thousand nine hundred and thirty (1930), between EDWARD R. DAY, of White Haven, Pennsylvania (hereinafter referred to as "Day"), party of the first part, PEERLESS-UNION EXPLOSIVES CORPORATION, a corporation organized and existing under the laws of the State of Delaware, (hereinafter referred to as "New Company") party of the second part, and ATLAS POWDER COMPANY, a corporation likewise organized and existing under the laws of the State of Delaware (hereinafter referred to as "Atlas"), party of the third part.

WHEREAS, simultaneously with the execution of this agreement Day, pursuant to a certain Plan of Reorganization has transferred his holdings, viz: 2,534.38 shares of Common Stock of Peerless Explosives Company, a corporation organized and exist-

ing under the laws of the State of Delaware, to H. K. Seligman and W. E. Fletcher, who in turn have transferred the same to New Company; and

WHEREAS, part of the consideration for such transfer is to be the reimbursement by New Company of any Federal Income Tax imposed upon Day as a result of the said transaction or the subsequent sale by him of the securities of Atlas received by him therein, all under the terms and conditions hereinafter set forth: and

WHEREAS, Atlas is a substantial stockholder of New Company and desires that such Plan of Reorganization be consummated:

NOW, THEREFORE, in consideration of the transfer and delivery by Day to the said H. K. Seligman and W. E. Fletcher of his holdings in the Peerless Explosives Company simultaneously with the execution of this agreement, and for other good and valuable consideration, the receipt whereof by New Company and Atlas is hereby acknowledged, this agreement

WITNESSETH:

I—Day agrees to promptly forward to New Company any notices received from time to time from the Internal Revenue Department assessing Federal Income Tax upon the profit derived by him (1) from the transfer of his said holdings in the Peerless Explosives Company to H. K. Seligman and W. E. Fletcher in accordance with a certain agreement between them and other stockholders of the said Peerless Explosives Company, dated the seventh day of October, 1930, and (2) from the subse-

quent sale by Day of the securities of Atlas received by him in exchange for his said Peerless holdings under the said agreement. A list setting forth the said cash and securities of Atlas received by Day as aforesaid is attached hereto, made a part hereof and marked Exhibit "A".

II—New Company agrees to place Day in funds for the payment of such taxes when due, provided that for the purpose of computing profit upon the subsequent sale by Day of securities received by him under such agreement and the obligation of New Company hereunder the sales price of such securities shall in no event exceed $100 per share for Atlas Preferred Stock and $66.66-2/3 per share for Atlas Common Stock, and provided further that the obligation of New Company to place Day in funds for the payment of Federal Income Tax shall in no event exceed in the aggregate the sum of $22,175.83. New Company assumes no obligation hereunder to pay or reimburse Day for any tax imposed upon the receipt or sale of any shares of Common Stock of Peerless-Union Explosives Corporation.

III—Day agrees that his Federal Income Tax Return for the year 1930, and for any other year in which any such sales shall be made, shall be prepared under the supervision of Messrs. Barrow, Wade, Guthrie & Co., Public Accountants. Day also agrees that said accountants shall represent him at all audits of said returns, and at all conferences and hearings thereon, and that he will execute such powers of attorney and other documents as may be necessary in this connection. Day also agrees that he will not pay any such taxes without the written

consent of New Company. New Company reserves the right at its own cost and expense to protest any Federal Income Tax assessed against Day upon the said profit. New Company shall pay all charges of the accountants and in the event of a contest all other charges including interest and penalties. No such costs, interest or penalties shall be credited against the obligation of New Company contained in Paragraph II of this agreement.

IV—Atlas hereby guarantees the payments to be made by New Company at the times and in the amounts herein provided.

V—This agreement shall bind and inure to the benefit of the parties hereto, their respective executors, administrators, successors and assigns.

IN WITNESS WHEREOF, Day has hereunto set his hand and seal, and the corporate parties hereto have caused this agreement to be executed on their several behalves the day and year aforesaid.

Signed, Sealed and Delivered)
:
in the presence of)

Edward R. Day (SEAL)

PEERLESS-UNION EXPLOSIVES CORPORATION

Seal of Peerless-Union
Explosives Corporation

By H. K. Seligman
President

Attest:
W. E. Fletcher
Secretary

ATLAS POWDER COMPANY
By Isaac Fogg
Secretary-Treasurer

EXHIBIT "A"

List of Cash and Securities of the
Atlas Powder Company received by Day

—o—

Cash — — — — — — — — — — — — — — — — — — $42,906.67

Temporary receipts numbered from
inclusive, for 625 shares of Preferred
Stock of Atlas Powder Company

Temporary receipts numbered from
inclusive, for 1,080 shares of Common
Stock of Atlas Powder Company

		Pfd.	Common
Edward R. Day	P-27/32 incl.	600 shs.	C-17
	P-33	25 "	1080 shs.
		625 "	

EXHIBIT "G"

MEMORANDUM OF AGREEMENT dated the day of October, one thousand nine hundred and thirty (1930), between R. I. BASHFORD, of Philadelphia, Pennsylvania (hereinafter referred

to as "Bashford"), party of the first part, PEERLESS-UNION EXPLOSIVES CORPORATION, a corporation organized and existing under the laws of the State of Delaware (hereinafter referred to as "New Company") party of the second part, and ATLAS POWDER COMPANY, a corporation likewise organized and existing under the laws of the State of Delaware (hereinafter referred to as "Atlas"), party of the third part.

WHEREAS, simultaneously with the execution of this agreement Bashford, pursuant to a certain Plan of Reorganization has transferred his holdings, viz: 2,534.38 shares of Common Stock of Peerless Explosives Company, a corporation organized and existing under the laws of the State of Delaware, to H. K. Seligman and W. E. Fletcher, who in turn have transferred the same to New Company; and

WHEREAS, part of the consideration for such transfer is to be the reimbursement by New Company of any Federal Income Tax imposed upon Bashford as a result of the said transaction or the subsequent sale by him of the securities of Atlas received by him therein, all under the terms and conditions hereinafter set forth; and

WHEREAS, Atlas is a substantial stockholder of New Company and desires that such Plan of Reorganization be consummated:

NOW, THEREFORE, in consideration of the transfer and delivery by Bashford to the said H. K. Seligman and W. E. Fletcher of his holdings in the Peerless Explosives Company simultaneously with the execution of this agreement, and for other good and valuable consideration, the receipt whereof by

New Company and Atlas is hereby acknowledged, this agreement

WITNESSETH:

I—Bashford agrees to promptly forward to New Company any notices received from time to time from the Internal Revenue Department assessing Federal Income Tax upon the profit derived by him (1) from the transfer of his said holdings in the Peerless Explosives Company to H. K. Seligman and W. E. Fletcher in accordance with a certain agreement between them and other stockholders of the said Peerless Explosives Company, dated the seventh day of October, 1930, and (2) from the subsequent sale by Bashford of the securities of Atlas received by him in exchange for his said Peerless holdings under the said agreement. A list setting forth the said cash and securities of Atlas received by Bashford as aforesaid is attached hereto, made a part hereof and marked Exhibit "A".

II—New Company agrees to place Bashford in funds for the payment of such taxes when due, provided that for the purpose of computing profit upon the subsequent sale by Bashford of securities received by him under such agreement and the obligation of New Company hereunder the sales price of such securities shall in no event exceed $100 per share for Atlas Preferred Stock and $66.66-2/3 per share for Atlas Common Stock, and provided further that the obligation of New Company to place Bashford in funds for the payment of Federal Income Tax shall in no event exceed in the aggregate the sum of $22,175.83. New Company assumes no obligation hereunder to pay or reimburse Bashford

for any tax imposed upon the receipt or sale of any shares of Common Stock of Peerless-Union Explosives Corporation.

III—Bashford agrees that his Federal Income Tax Return for the year 1930, and for any other year in which any such sales shall be made, shall be prepared under the supervision of Messrs. Barrow, Wade, Guthrie & Co., Public Accountants. Bashford also agrees that said accountants shall represent him at all audits of said returns, and at all conferences and hearings thereon, and that he will execute such powers of attorney and other documents as may be necessary in this connection. Bashford also agrees that he will not pay any such taxes without the written consent of New Company. New Company reserves the right at its own cost and expense to protest any Federal Income Tax assessed against Bashford upon the said profit. New Company shall pay all charges of the accountants and in the event of a contest all other charges including interest and penalties. No such costs, interest or penalties shall be credited against the obligation of New Company contained in Paragraph II of this agreement.

IV—Atlas hereby guarantees the payments to be made by New Company at the times and in the amounts herein provided.

V—This agreement shall bind and inure to the benefit of the parties hereto, their respective executors, administrators, successors and assigns.

IN WITNESS WHEREOF, Bashford has hereunto set his hand and seal, and the corporate parties hereto have caused this agreement to be exe-

cuted on their several behalves the day and year aforesaid.

Signed, Sealed and Delivered)
:
in the presence of)
Raymond I. Bashford (SEAL)

PEERLESS-UNION EXPLOSIVES CORPORATION
By H. K. Seligman
President

Attest:
W. E. Fletcher
Secretary

ATLAS POWDER COMPANY
By Isaac Fogg
Secretary-Treasurer

EXHIBIT "A"

List of Cash and Securities of the Atlas Powder Company received by R. I. Bashford

—o—o—o—o—o—

Cash — — — — — — — — — — — — — — — —	$25,306.67
Temporary receipts numbered from { P-20/25 incl. 600 shs. P-26 25 "	
inclusive, for 625 shares of Preferred Stock of Atlas Powder Company	625

Temporary receipts numbered **from* C-16—
inclusive, for 1,344 shares of Common
Stock of Atlas Powder Company.

* (Words in italics crossed out on original)

EXHIBIT "H"

MEMORANDUM OF AGREEMENT dated the seventh day of October, one thousand nine hundred and thirty (1930), between EUGENE FROST, of Philadelphia, Pennsylvania (hereinafter referred to as "Frost"), party of the first part, PEERLESS-UNION EXPLOSIVES CORPORATION, a corporation organized and existing under the laws of the State of Delaware, (hereinafter referred to as "New Company") party of the second part, and ATLAS POWDER COMPANY, a corporation likewise organized and existing under the laws of the State of Delaware (hereinafter referred to as "Atlas"), party of the third part.

WHEREAS, simultaneously with the execution of this agreement Frost, pursuant to a certain Plan of Reorganization has transferred his holdings, viz: 3,296.24 shares of Common Stock of Peerless Explosives Company, a corporation organized and existing under the laws of the State of Delaware, to H. K. Seligman and W. E. Fletcher, who in turn have transferred the same to New Company; and

WHEREAS, part of the consideration for such transfer is to be the reimbursement by New Company of any Federal Income Tax imposed upon

Frost as a result of the said transaction or the subsequent sale by him of the securities of Atlas received by him therein, all under the terms and conditions hereinafter set forth; and

WHEREAS, Atlas is a substantial stockholder of New Company and desires that such Plan of Reorganization be consummated:

NOW, THEREFORE, in consideration of the transfer and delivery by Frost to the said H. K. Seligman and W. E. Fletcher of his holdings in the Peerless Explosives Company simultaneously with the execution of this agreement, and for other good and valuable consideration, the receipt whereof by New Company and Atlas is hereby acknowledged, this agreement

WITNESSETH:

I—Frost agrees to promptly forward to New Company any notices received from time to time from the Internal Revenue Department assessing Federal Income Tax upon the profit derived by him (1) from the transfer of his said holdings in the Peerless Explosives Company to H. K. Seligman and W. E. Fletcher in accordance with a certain agreement between them and other stockholders of the said Peerless Explosives Company, dated the seventh day of October, 1930, and (2) from the subsequent sale by Frost of the securities of Atlas received by him in exchange for his said Peerless holdings under the said agreement. A list setting forth the said cash and securities of Atlas received by Frost as aforesaid is attached hereto, made a part hereof and marked Exhibit "A".

II—New Company agrees to place Frost in funds for the payment of such taxes when due, provided that for the purpose of computing profit upon the subsequent sale by Frost of securities received by him under such agreement and the obligation of New Company hereunder the sales price of such securities shall in no event exceed $100 per share for Atlas Preferred Stock and $66.66-2/3 per share for Atlas Common Stock, and provided further that the obligation of New Company to place Frost in funds for the payment of Federal Income Tax shall in no event exceed in the aggregate the sum of $28,842.09. New Company assumes no obligation hereunder to pay or reimburse Frost for any tax imposed upon the receipt or sale of any shares of Common Stock of Peerless-Union Explosives Corporation.

III—Frost agrees that his Federal Income Tax Return for the year 1930, and for any other year in which any such sales shall be made, shall be prepared under the supervision of Messrs. Barrow, Wade, Guthrie & Co., Public Accountants. Frost also agrees that said accountants shall represent him at all audits of said returns and at all conferences and hearings thereon, and that he will execute such powers of attorney and other documents as may be necessary in this connection. Frost also agrees that he will not pay any such taxes without the written consent of the New Company. New Company reserves the right at its own cost and expense to protest any Federal Income Tax assessed against Frost upon the said profit. New Company shall pay all charges of the accountants and in the event of a contest all other charges including interest and penalties. No such costs, interest or penalties

shall be credited against the obligation of New Company contained in Paragraph II of this agreement.

IV—Atlas hereby guarantees the payments to be made by New Company at the times and in the amounts herein provided.

V—This agreement shall bind and inure to the benefit of the parties hereto, their respective executors, administrators, successors and assigns.

IN WITNESS WHEREOF, Frost has hereunto set his hand and seal, and the corporate parties hereto have caused this agreement to be executed on their several behalves the day and year aforesaid.

Signed, Sealed and Delivered)
:
in the presence of)
Eugene Frost (SEAL)

PEERLESS-UNION EXPLOSIVES CORPORATION
By H. K. Seligman
President

Attest:
W. E. Fletcher
Secretary

(SEAL)

ATLAS POWDER COMPANY
By Isaac Fogg
Secretary-Treasurer

EXHIBIT "A"

List of Cash and Securities of the Atlas Powder Company received by Eugene Frost

Cash — — — — — — — — $50,536.66

Temporary receipts numbered from
for 959 shares of Preferred Stock of
Atlas Powder Company

Temporary receipts numbered from
for 1,264-1/2 shares of Common Stock
of Atlas Powder Company.

ATLAS POWDER CO. STOCK

	PFD		COM.	
J. R. Ward	P-14 - 10	Shs.	C-11 -	24 Shs
E. E. Locklin	P-16 - 48	"		
C. S. Simonsen	P-17 - 85	"	C-13	16½
Eugene Frost	P-18 - 70	"	C-14	105
"	P-19-746	"	C-15	1119
	959			1264½

EXHIBIT "J"

October 7, 1930.

Mr. Eugene Frost,
c/o Peerless Explosives Company
260 South Broad Street,
Philadelphia, Penna.

Dear Sir:

Referring to a certain agreement entered into by us, of even date, covering the payment of income taxes imposed upon you as the holder of certain shares of common stock of Peerless Explosives Company, we understand that of the 3,296.24 shares transferred to H. K. Seligman and W. E. Fletcher by you, pursuant to a certain Plan of Reorganization, 761.86 shares were owned by the following:

George C. Dissette	25
Cora D. Wilson	25
J. R. Ward	57.14
J. E. Slusser	42.86
F. E. Sorensen	35.72
George P. Teel	28.57
V. J. Walters	28.57
E. E. Locklin	236
C. S. Simonsen	155
W. C. Manning	128

In consideration for the delivery by you of the said shares, the undersigned hereby agree that the obligation imposed upon them under the terms of the said income tax agreement of even date shall extend to and apply under the same terms and con-

ditions to any income tax imposed upon the aforementioned as a result of the delivery of the said shares, in accordance with the said Plan of Reorganization. Provided always that the total tax to be paid by the undersigned shall in no event exceed the sum of $28,842.09.

Very truly yours,

PEERLESS-UNION EXPLOSIVES CORPORATION

By H. K. SELIGMAN
President

Accepted:

ATLAS POWDER COMPANY

By ISAAC FOGG
Secretary-Treasurer

EXHIBIT "K"

PEERLESS EXPLOSIVES COMPANY.

Special Meeting of Directors

A special meeting of the Board of Directors of PEERLESS EXPLOSIVES COMPANY was held at the office of the corporation, 260 South Broad Street, Philadelphia, Pennsylvania, on Monday, January 5, 1931, at 3:00 o'clock P. M.

The following Directors were present:

H. K. Seligman,
W. E. Fletcher,
Geo. P. Teel,

being more than a majority of the members of the Board, and therefore a quorum.

Mr. H. K. Seligman, President of the corporation, acted as Chairman of the meeting, and Mr. W. E. Fletcher, Secretary of the corporation, acted as Secretary of the meeting.

The Secretary presented and read a written call and waiver of notice, pursuant to which the meeting was held, signed by all of the Directors of the corporation, specifying the purposes thereof, and the same was ordered prefixed to the minutes of this meeting.

The Chairman thereupon stated that this meeting had been called for the purpose of taking action upon the proposed dissolution of the corporation. He called to the attention of the Board the fact that the corporation had sold its entire business and assets, subject to its outstanding liabilities, to Peerless-Union Explosives Corporation on October 7, 1930, in exchange for note of said Peerless-Union Explosives Corporation in the amount $1,036,800.00; that said note now represents the only asset of this Corporation; that all of the outstanding preferred and common stock of this Corporation is now owned by said Peerless-Union Explosives Corporation; and that this Corporation is not now engaged in any active business.

Thereupon, on motion duly made and seconded, the following resolutions were unanimously adopted:

RESOLVED, That in the judgment of this Board of Directors it is advisable and most

for the benefit of Peerless Explosives Company that said corporation should be dissolved.

RESOLVED FURTHER, That the officers of this Corporation be and they are hereby authorized and instructed to endeavor to obtain the unanimous consent of all the stockholders of the corporation to the dissolution of the corporation.

RESOLVED FURTHER, That upon securing the unanimous consent, in writing, of all of the stockholders of the corporation, the President and the Secretary and Treasurer of this corporation be and they are hereby authorized directed and empowered to make and file all such certificates as may be required by the Laws of the State of Delaware in order to effect the dissolution of this corporation.

RESOLVED FURTHER, That upon the completion of the dissolution of this corporation, the proper officers of this corporation be and they are hereby authorized, directed and empowered to mark cancelled the note of Peerless-Union Explosives Corporation, dated October 7, 1930, and drawn to the order of this corporation in the sum of $1,036,800.00, and to deliver the same to Peerless-Union Explosives Corporation in exchange for certificates for all of the outstanding preferred and common stock of this corporation, duly endorsed for transfer.

RESOLVED FURTHER, That upon receipt of such stock certificates for all of the outstanding preferred and common stock of this corporation, the proper officers of this corporation

be and they are hereby authorized, directed and empowered to cancel the same and to attach such certificates to the appropriate stubs in the several stock certificate books of this corporation.

There being no further business to come before the meeting, the same was, on motion duly made and seconded, adjourned.

(SIGNED) W. E. Fletcher
Secretary.

Approved:

(SIGNED) H. K. Seligman
Chairman.

EXHIBIT "L"

COPY

CERTIFICATE OF DISSOLUTION

of

PEERLESS EXPLOSIVES COMPANY

WE, the undersigned, being respectively the President and the Secretary and Treasurer of Peerless Explosives Company, a corporation of the State of Delaware, do hereby certify:

FIRST: That the location of the principal office of the corporation in the State of Delaware is at Wilmington, County of New Castle.

SECOND: That at a meeting of the Board of Directors of said corporation duly held on the fifth day of January, A. D. 1931, and of which meeting every director waived notice, in writing, the following Resolution was adopted by a majority of the whole Board of Directors:

> RESOLVED, That in the judgment of this Board of Directors it is advisable and most for the benefit of Peerless Explosives Company that said corporation should be dissolved.

THIRD: That all of the stockholders of the corporation have consented, in writing, to the dissolution of the corporation, which Consent is hereto annexed and made a part hereof.

FOURTH: That the names and residences of the Directors and officers of said corporation are as follows:

Directors

Name	Residence
H. K. Seligman	Tamaqua, Pa.
W. E. Fletcher	
Geo. P. Teel	Roslyn, Pa.
W. C. Manning	Wilkes-Barre, Pa.

Officers

Name	Office	Residence
H. K. Seligman	President	Tamaqua, Pa.
W. E. Fletcher	Secretary	Philadelphia, Pa.
W. E. Fletcher	Treasurer	Philadelphia, Pa.

IN WITNESS WHEREOF, we have hereunto set

our hands and affixed the seal of said corporation this 5th day of January, A. D. 1931.

(SIGNED) H. K. Seligman
President.

(SIGNED) W. E. Fletcher
Secretary and Treasurer

COPY

STATE OF PENNSYLVANIA :
: ss.
COUNTY OF PHILADELPHIA:

H. K. SELIGMAN, President, and W. E. FLETCHER, Secretary and Treasurer of Peerless Explosives Company, being duly sworn on their respective oaths depose and say that the foregoing Certificate signed by them is true.

Sworn to and subscribed :
before me this 5th day :
of January, A. D. 1931. :

(Signed) H. K. Seligman
President

(Signed) W. E. Fletcher
Secretary and Treasurer

(Signed) Elbert Williamson
Notary Public

My commission expires
March 7, 1931

(SEAL)

COPY

CONSENT TO DISSOLUTION
of
PEERLESS EXPLOSIVES COMPANY
By Unanimous Consent of the Stockholders

The undersigned, being the holders of all the outstanding voting stock of Peerless Explosives Company, a corporation organized and existing under the laws of the State of Delaware, having its principal office in the State of Delaware, in the City of Wilmington, County of New Castle, having consented and do hereby consent to the dissolution of said Peerless Explosives Company.

IN WITNESS WHEREOF, Peerless-Union Explosives Corporation has caused the execution of this Consent in its corporate name and on its behalf by its President, and its corporate seal duly attested by its Secretary to be hereunto affixed, and the individual stockholders have hereunto set their hands and seals this day of January, A. D. 1931.

Name	No. of Shares
PEERLESS-UNION EXPLOSIVES CORPORATION	
By H. K. Seligman, President	14,995
(SEAL)	
Attest W. E. Fletcher, Secretary	
H. K. Seligman (SEAL)	Two

W. E. Fletcher	(SEAL)	One
G. P. Teel	(SEAL)	One
W. C. Manning	(SEAL)	One

STATE OF PENNSYLVANIA :
: ss
COUNTY OF PHILADELPHIA :

H. K. SELIGMAN and W. E. FLETCHER, being respectively President and Secretary and Treasurer of Peerless Explosives Company, being duly sworn, on oath, depose and say that the foregoing Certificate giving the names and residences of the officers and directors of said corporation, by them signed, is true and correct, and that the Consent to the dissolution of said corporation has been signed by the holders of all of the outstanding voting stock of the said corporation.

Sworn to and subscribed :
before me this 5th day :
of January, A. D. 1931. :

(Signed) H. K. Seligman
President

(Signed) W. E. Fletcher
Secretary and Treasurer

(Signed) Elbert Williamson
Notary Public

(SEAL)

My commission expires
March 7, 1931

EXHIBIT "M"

October 7, 1930

Received from PEERLESS - UNION EXPLOSIVES CORPORATION Checks Nos. 24 and 25 to the order of the undersigned, for Twenty-five Thousand, Three Hundred Six and 67/100 Dollars; Certificates for 2720.08 shares of the Common Stock of said corporation numbered as follows:

Certificates		Scrip	
No.	Shares	No.	Shares
440	9	437	.08
442	500		
443	500		
444	500		
445	500		
446	500		
447	200		
462	11		
TOTAL	2720.08		

Temporary Receipts numbered from P20 to P-26 inclusive, for 625 shares of the Preferred Stock of Atlas Powder Company; and Temporary receipt C-16 for 1344 shares of the Common Stock of said Atlas Powder Company.

Raymond I. Bashford (signed)
Raymond I. Bashford

EXHIBIT "N"

Statement Showing Holdings of Record October 7, 1930 of Peerless Explosives Company Common Stock and Actual Exchanges on which Settlement were Based

Peerless Explosives Co. Common Stock

	Holdings of Record Oct. 7, 1930	Exchanges on Which Settlements Were Based	Excess of Exchange over Holdings of Record
	Shares	Shares	
F. K. Gregory	1	1	
M. L. Gregory	1	1	
N. C. Burke	1	1	
Maude Morris	10	10	
Geo. C. Dissette	25	25	
Cora D. Wilson	25	25	
J. Randall Ward	29	57.14	28.14
J. E. Slusser	10	42.86	32.86
F. E. Sorensen	25	35.72	10.72
George P. Teel	5	28.57	23.57
V. J. Walters	20	28.57	8.57
T. W. Dickey	26	26	
Harry K. Gregory	96	96	
E. E. Locklin	236	236	
C. S. Simonsen	155	155	
W. C. Manning	153	128	25
Eugene Frost	2504	2534.38	30.38
R. I. Bashford	2541	2534.38	6.62
James Henry Bashford	2		2
Margaret A. Bashford	2		2
Alice E. Bashford	2		2

Nellie Ester Bashford	2		*2*
R. I. Bashford, Jr.	2		*2*
Robert Teel	58		*58*
E. R. Day	2557	2534.38	*22.62*
N. P. Kinback	10		*10*
Dora Ricker	2		*2*
	8500	8500	

(Note: Italic figures indicate figures typed in red on original copy.)

EXHIBIT "O"

C

Name of Record Holder of Peerless Stock	No. Shares of Peerless Preferred	No. Shares of Peerless Common	Received in Exchange: Cash	Atlas Preferred	Atlas Common	Peerless Union Common
F. K. Gregory		1	70.00			1.05
M. S. Gregory		1	70.00			1.05
N. C. Burke		1	70.00			1.05
Maude Morris		10	700.00			10.59
Geo. C. Dissette		25	1,750.00			26.48
Cora D. Wilson (Mrs. M. K.)		25	1,750.00			26.48
J. R. Ward		29	1,400.00	10	24	30.70
J. E. Slusser		10	3,000.00			10.59
F. E. Sorensen		25	2,500.00			26.48
Geo. P. Teel		5	2,000.00			5.30
Robert Teel		58				
V. R. Walters		20	2,000.00			21.18
T. W. Dickey		26	1,820.00			27.53

Harry K. Gregory	96	3,520.00	16	24	101.66
E. E. Locklin	236	11,720.00	48		249.92
C. S. Simonsen	155	1,250.00	85	16½	164.15
W. C. Manning	153	8,960.00			135.55
Eugene Frost	2,504	14,206.66	816	1,224	2,720.08
Raymond I. Bashford	2,541)				
Margaret L. Bashford	2)				
Alice E. Bashford	2)				
Nellie Ester Bashford	2)	25,306.67	625	1,344	2,720.08
R. I. Bashford, Jr.	2)				
James Henry Bashford	2)				
E. R. Day	2,557)				
N. P. Kinback (for E. R. Day Ctf. #101)	10)	42,906.67	625	1,080	2,720.08
Dora Ricker (for E. R. Day)	2)				
Pfd. Shs.					

Total Majority Holders		8,500	$125,000.00	2,225	3,712½	9,000.00
Holders per original list of First National Bank of Tamaqua.	16,128**	5,788	403,200.00			6,447.79
Total Peerless Exchanged on Oct. 7, 1930	16,128	14,288	$528,200.00	2,225	3,712½	15,447.79

(*) These shares held in Teel's name for a/c of others not specified as majority group turned over en bloc the 8,500 shs. with instructions to make distributions herein set forth.

(**) There is included in this figure the 28 shares of Preferred Stock of the Peerless Explosives Company owned by Petitioner, Raymond I. Bashford.

EXHIBIT "P"

Name of Record Holder of Union Stock	No. of Shares Held Union Preferred	Union Common	Cash	Received Atlas Preferred	Atlas Common	Peerless Union Common
MAJORITY CONTRACTOR:						
J. Edgar Long	2,198	2,824		3,880½	5,000	9,302
MINORITY DIRECT EXCHANGE:						
Anna S. (Mrs. J. E.) Long	232½	92		232½		208.25
Total turned in direct at closing	2,430½	2,916		4,093	5,000	9,510.25
THROUGH FIRST NATIONAL BANK OF TAMAQUA						
H. G. Ashcroft	36½	15	$ 3,650.00			33.25

Homer Forinash	7	5	700.00	6.50
(?) J. Sandridge	6½	2½	650.00	5.75
(?). W. Stuber	1		100.00	.50
Thomas M. Philibin	4		400.00	2.00
H. H. Hunter	15	6	1,500.00	13.50
H. Lasey	8	5	800.00	7.00
Kirk King	4		400.00	2.00
C. M. Hochheimer	6½	10	650.00	23.25
H. B. Cooper Estate	184½		18,450.00	92.50
J. W. Harrison	7½	3	750.00	6.75
F. S. Ambrose	2½	1	250.00	2.25
E. H. Shaffer	13	5	1,300.00	11.50
Chas. B. Johnson	100	433	10,000.00	841.75
(?) C. Huston	37½	17½	3,750.00	36.25
P. E. Reutter	51	399½	5,100.00	425.00
J. Montgomery	13½	5	1,350.00	11.75
J. A. Broderick	9½	4	950.00	8.75
T. N. Larkin	5		500.00	2.50
F. L. Shaffer	5	4	500.00	6.50

J. A. Farr	6	2	600.00	5.00
L. Schen	20	7½	2,000.00	17.50
E. M. Schen	52½	19½	5,250.00	45.75
T. D. Thomas	2½	1	250.00	2.25
D. A. McDevitt	14	5½	1,400.00	12.60
A. V. Morgan	9½	4	950.00	8.75
(?) F. Doyle	2½	1	250.00	2.25
C. J. Boner	16½	7	1,650.00	15.25
D. J. O'Shea	37	10	3,700.00	28.50
Mary Whitesell	2½	1	250.00	2.25
L. S. Moffett (Mrs.)	2½	1	250.00	2.25
J. N. Starrett	55	26½	5,500.00	54.00
S. Moffett	1	½	100.00	1.00
J. E. McCombs	3½		350.00	1.75
James McCombs	1		100.00	.50
S. R. Bentley	26	10	2,600.00	23.00
J. E. W. Atchison	6½	3	650.00	6.25
Geo. P. Jones	3		300.00	1.50
J. Hawes	1		100.00	.50

G. P. Jones	10	67½	1,000.00			72.50
Forward	790	1,078½	$79,000.00			1,842.25
Forward	2,430½	2,916		4,093	5,000	9,510.25

Name of Record Holder of Union Stock	No of Shares Held Union Preferred	Union Common	Cash	Received Atlas Preferred	Atlas Common	Peerless Union Common
THROUGH FIRST NATIONAL BANK OF TAMAQUA (cont'd.)						
Forward	2,403½	2,916		4,093	5,000	9,510.25
Forward	790	1,078½	$ 79,000.00			1,842.25
(?) H. Howes Estate	6½	2½	650.00			5.75
F. C. Slee	13½	5	1,350.00			11.75
G. M. Hochheimer	20		2,000.00			
J. T. Stoddard	13½	5	1,350.00			11.75
G. P. Jones	1		100.00			.50

F. H. Rogers	11½	5	1,150.00			10.75
M. J. & S. Rogers	1	1	100.00			1.50
E. C. Stowell	1		100.00			.50
E. M. Perkins	1		100.00			.50
Mrs. J. M. Shinn	2½	1	250.00			2.25
J. W. Jones	8		800.00			4.00
(?) D. Weaver	67½	25	17,000.00			200.00
(?). A. Washington		1				1.00
J. W. Howard		1				1.00
P. W. Bailey		1				1.00
C. P. Boughner		1				1.00
C. H. Harris		1				1.00
Total Tamaqua Bank	937	1,128	$103,950.00	4,093	5,000	2,096.50
Grand Total	3,367½	4,044	$103,950.00			11,606.75

Barrow, Wade, Guthrie & Co. Schedule C

RAYMOND I. BASHFORD

260 South Broad Street, Philadelphia, Pa.

PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC.

Stocks		Cost	Proceeds	Net Profit
10	General Motors	$ 427.00√	$ 437.96√	$ 10.96
10	Radio-Keith-Orpheum	369.50√	447.60√	78.10
10	Atlas Powder Co.	803.25√	907.60√	104.35
10	Gillette Safety Razor	840.75√	862.60√	21.85
100	Armour & Co. "B"	345.00√	366.50√	21.50
20	Radio-Keith-Orpheum	763.00√	862.70√	99.70
28	Peerless Explosives Pfd.	650.00√	700.00√	50.00
		$4,198.50	$4,584.96	386.46√

Pursuant to a plan of reorganization, received for Peerless Explosives Co. Common Stock, securities of a corporation party to the reorgan-

ization and cash. Since the amount of cash received is less than the profit on the entire transaction, in accordance with the limitation of Sec. 112 (c) of the Revenue Act of 1928, the amount of the cash received is here reported as income 25,306.67

Total Profit on Securities ..... $ 25,693.13

A-3

EXHIBIT "S"

ATLAS POWDER COMPANY

1930		Shares Traded in	High	Low	Close	Closing Bid	Price Asked
Sept	6 Com.	1700	75¾	73	75½	75½	75¾
	Pfd.					101½	102½
Sept.	7			Sunday			
	8 Com.	1000	76⅞	74¾	74¾	74¾	76
	Pfd.	10	102½	102½	102½	101¾	102½
	9 Com.	200	75⅞	75¾	75⅞	75	75⅞
	Pfd.					101¼	102½
	10 Com.					73	75
	Pfd			No Sales		101¼	102½
	11 Com.					70	74¾
	Pfd.	20	101¼	101¼	101¼	101¼	102½
	12 Com.					70	74½
	Pfd.	20	102½	102½	102½	101¼	102½
	13 Com.			No Sales		70¼	74¼
	Pfd.					101¼	102½
	14			Sunday			
	15 Com.					70	74
	Pfd			No Sales		101¼	102½
	16 Com.	400	72⅛	70¼	72⅛	70	72⅛
	Pfd.					101¼	102½
	17 Com.	100	71	71	71	71	75½
	Pfd.					101¼	102½
	18 Com.					71	74½
	Pfd.			No Sales		101¼	102½
	19 Com.	300	71	70⅛	70⅛	70½	74½
	Pfd.	10	102½	102½	102½	101¾	102½
	20 Com.					70½	73½
	Pfd.	40	103½	102½	103½	101¾	105
	21			Sunday			
	22 Com.	100	70	70	70	70	72
	Pfd.					101¾	105
	23 Com.			No Sales		65	71
	Pfd.					101¾	103
	24 Com.	100	70	70	70	68	69⅛
	Pfd.					101¾	102⅝
Sept.	25 Com.					65	70
	Pfd.			No Sales		102	103
	26 Com.					65	70
	Pfd.			No Sales		101¾	103
	27 Com.	100	65¼	65¼	65¼	65	70
	Pfd.					101¾	103
	28			Sunday			
	29 Com.	400	65⅛	65	65	65	68⅛
	Pfd.	30	100½	100½	100½	103½	105
	30 Com.	1500	65⅛	63¼	63¼	63	64
	Pfd.	30	102½	102½	102½	101½	102½

ATLAS POWDER COMPANY

1930	Shares Traded in	High	Low	Close	Closing Bid	Price Asked
Oct. 1 Com.	200	65	65	65	63¼	65½
Pfd.	10	101½	101½	101½	101½	102½
2 Com.	100	65	65	65	65	65½
Pfd.					101¾	102½
3 Com.	100	66	66	66	64	66
Pfd.	10	101¼	101¼	101¼	101¼	102¼
4 Com.					65	69½
Pfd.		No Sales			101¼	102¼
5		Sunday				
6 Com.					63	65
Pfd.	10	101¼	101¼	101¼	100½	102¼
7 Com.	100	64	64	64	64	74½
Pfd.					100½	102½
8 Com.	1000	67¼	65	67¼	66	68½
Pfd.					101¾	102½
9 Com.	400	64	63	63	63¼	65
Pfd.					101¾	102½
10 Com.	100	62⅛	62⅛	62⅛	64	68
Pfd.	40	102½	101¾	101¾	101¾	102½
11 Com.	500	65	65	65	65	67⅜
Pfd.					101¾	102½
12		Sunday				
13		Columbus Day				
14 Com.					63	65
Pfd.	20	101¾	100½	100½	100½	101¾
Oct. 15 Com.					62	65
Pfd.		No Sales			101¼	101¾
16 Com.					63	65
Pfd.		No Sales			101¼	101¾
17 Com.		No Sales			63	65
Pfd.					101¼	101¾
18 Com.	2100	62	56¼	56¼	56¼	62½
Pfd.					101¼	101¾
19		Sunday				
20 Com.					57	61
Pfd.	50	99¾	99¾	99¾	99	100¾
21 Com.	500	57½	56⅝	57	57	60
Pfd.	10	99½	99½	99½	—	—
22 Com.	700	56½	55	55	55	56
Pfd.	10	100⅞	100⅞	100⅞	100	101
23 Com.	200	59¾	54	59¾	57	59¾
Pfd.					100	101
24 Com.					55	60
Pfd.	220	100⅛	100	100	100	100½
25 Com.					55½	60
Pfd.		No Sales			99	100
26		Sunday				
27 Com.	500	57½	57½	57½	55½	60
Pfd.	30	101	100	101	99	100
28 Com.					55	60
Pfd.	60	100½	100	100	100	101

ATLAS POWDER COMPANY

1930		Shares Traded in	High	Low	Close	Closing Bid	Price Asked
29	Com.					56	59½
	Pfd.	50	100	100	100	100	101
30	Com.					55	59⅝
	Pfd.			No Sales		100	101
31	Com.	200	58	58	58	55	59⅝
	Pfd.	50	100	100	100	100	101
Nov. 1	Com.			No Sales		55	59
	Pfd.					100	100¼
2				Sunday			
Nov. 3	Com.					56¼	58
	Pfd.	20	100¼	100¼	100¼	100	100¼
4				Election Day			
5	Com.						
	Pfd.			No Sales			
6	Com.	100	55	55	55	55	57
	Pfd.					100	100¼
7	Com.	300	53	52	52		
	Pfd.	120	100¼	100	100¼	100	100¼

OPINION

UNITED STATES BOARD OF TAX APPEALS

RAYMOND I. BASHFORD, PETITIONER, v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 71565. Promulgated September 10, 1935.

Where the petitioner under a plan of reorganization exchanged 2,534.38 shares of the common stock of the Peerless Explosives Co. for 1,344 shares of common stock and 625 shares of the preferred stock of the Atlas Powder Co., 2,720.08 shares of common stock of the Peerless-Union Explosives Corporation, and $25,306.67 in cash, the market value of the Atlas Powder Co. common and preferred stock was not taxable as income, as the reorganization was a tax-free transaction with the exception of the cash involved.

Walter G. Moyle, Esq., for the petitioner.
W. Frank Gibbs, Esq., for the respondent.

OPINION.

SMITH: This case involves a deficiency in income tax of $35,941.63 for the calendar year 1930, and depends for its solution upon the question of whether there was a reorganization of three corporations into one, and whether another corporation, the Atlas Powder Co., which was not reorganized, was a party to the reorganization.

The evidence consists of a stipulation of facts, including a number of exhibits, and the oral testimony of two witnesses.

Prior to October 7, 1930, the Peerless Explosives Co. was a Delaware corporation, engaged in the manufacture and sale of explosives. There were issued and outstanding on October 7, 1930, 17,672 shares of preferred stock of a par value of $25 per share and 14,890 shares of common stock of no par value. On the same date petitioner was the owner of 2,541 shares of common stock of the Peerless Explosives Co. and 28 shares of its preferred stock. This company will hereinafter be referred to as Peerless.

On and prior to October 7, 1930, the Union Explosives Co. was a West Virginia corporation, engaged in the manufacture and sale of explosives. It had outstanding 3,367½ shares of preferred stock of a par value of $100 per share and 4,044 shares of common of no par value. This corporation will be referred to hereinafter as Union.

At the same time the Black Diamond Powder Co. was a corporation organized and existing under the laws of Pennsylvania, with an issue of 1,584 shares of common stock of the par value of $100 per share, all of which was owned by Peerless. This company will be referred to hereinafter as Black Diamond. It was engaged in the powder business.

On and prior to October 7, 1930, the Atlas Powder Co. was a corporation organized and existing under the laws of Delaware, engaged in the business of manufacturing and selling high explosives and related products. On October 7, 1930, there were is-

sued and outstanding 261,438¾ shares of common stock of no par value, including treasury stock, and 96,318 shares of preferred stock of $100 par value. Hereinafter this company will be referred to as Atlas.

On or about September 22, 1930, the Peerless-Union Explosives Corporation was organized under the laws of Delaware, and on or about October 6, 1930, its capital stock was increased from 500 shares of preferred stock of $100 par value and 500 shares of common stock without par value, to 50,000 shares of preferred stock of $100 par value and 100,000 shares of common stock of no par value. Hereinafter this company will be referred to as the new company.

Peerless, Union and Black Diamond were all engaged in the same general line of manufacture and sale of high explosives as was Atlas. Peerless, Union and Black Diamond were at the same time business competitors and customers of Atlas, since they purchased large quantities of chemicals used in the manufacture of their products from Atlas.

The situation of rivalry was not satisfactory to Atlas, which desired to remove the possible dangerous competition and to acquire for itself the business of these competitors. Early in 1930 Leland Lyon, president of Atlas, conceived the idea of reorganizing Peerless, Union and Black Diamond, and consolidating or merging them into a new company, which would be controlled by Atlas.

It was desired that the identity of Atlas in the transactions should not be known at the inception of the negotiations, so Lyon summoned to his of-

fice at Wilmington, Delaware, H. K. Seligman and W. E. Fletcher for consultation and formation of a plan of action. Both of these men were experienced in the powder business and had formerly been connected with Atlas, and were personally acquainted with many of the stockholders of Peerless and Union. It was for these reasons that they were selected by Atlas to conduct the preliminary negotiations. They were instructed that Atlas did not desire to purchase either the assets or stocks of Peerless, Union or Black Diamond, but to reorganize them into a new company by the exchange of stocks, which new company would be controlled by Atlas. It was desired that the stockholders of the old companies should go along with them into the new.

The preliminary negotiations with the majority stockholders of Peerless and Union were conducted by Atlas through its agents, H. K. Seligman and W. E. Fletcher, without disclosing the identity of Atlas until it had secured from said stockholders their oral assurances that they would exchange their stock in Peerless and Union substantially on the basis of the written contracts finally entered into conditionally on the ability of Seligman and Fletcher to secure the participation in the plan of substantially all of the remaining stockholders through option agreements. It was made plain from the beginning, however, that a strong financial interest was represented and would participate in the plan to the extent of furnishing necessary funds, and that Seligman and Fletcher and the principal stockholders of Peerless and Union would be officers in the new company.

Omitting unnecessary details, the main features

of the plan were that Peerless, Union and Black Diamond were to be consolidated into the new company, Peerless-Union Explosives Corporation, that the stockholders of the old companies would receive for their stock in the old companies stock in the new company, stock in Atlas and some cash. Atlas on its part was to furnish the new company with sufficient cash and sufficient shares of its own common and preferred stock to complete the transaction. In return it was to receive sufficient common and preferred stock in the new company to assure its control.

As a preliminary step in the proceedings Atlas caused the incorporation of the new company under the laws of Delaware on September 22, 1930, for the purpose of acquiring the business and assets of Peerless, Union and Black Diamond, and subscribed to all of its original issue of common and preferred stock, being 10 shares of common and 10 shares of preferred, for which it paid $1,001, of which $1,000 was for the preferred stock and $1 for the common stock. This stock was all issued to Atlas. Subsequently, on October 6, 1930, the capital stock of the new company was increased to 100,000 shares of common of no par value, and 50,000 shares of preferred of $100 par value.

On October 2, 1930, a special meeting of the board of directors of Atlas was held and upon motions duly adopted the actions of its executive officers in causing the formation of the new company for the purpose of acquiring the assets and business of Peerless, Union and Black Diamond, and the plan of reorganization were approved. The officers of Atlas were empowered and directed to invest in the capi-

tal stock of the new company up to an aggregate of 21,732 shares of the 6 percent cumulative preferred stock of the new company and 32,198 shares of its common stock, and in consideration therefor to deliver to the new company $960,560.25 in cash, 6,318 shares of Atlas preferred stock on the basis of $100 per share, and 8,712½ shares of Atlas common stock on a basis of $66.66-2/3 per share.

On October 7, 1930, the petitioner, Bashford, E. Frost of Philadelphia, and Edward R. Day of White Haven, Pennsylvania, as majority stockholders of Peerless, parties of the first part, and H. K. Seligman, and W. E. Fletcher, as promoters, parties of the second part, entered into a written contract by which the stockholders warranted, among other things, that they owned or controlled 8,500 shares of the common stock of Peerless. On their part the promoters warranted that the new company was a corporation organized under the laws of Delaware for the purpose of acquiring the assets of Peerless, Union and Black Diamond, subject to their several liabilities in accordance with the plan of reorganization. They further warranted that upon the acquisition of the assets of Peerless, Union and Black Diamond, the new company would have a working capital of at least $300,000, and an authorized capital of 150,000 shares represented by 50,000 shares of 6 percent cumulative preferred stock of the par value of $100 each and 100,000 shares of common stock of no par value, of which there would be outstanding 21,732 shares of preferred stock and 65,000 shares of common stock. The common stock carried voting rights, but the preferred stock could be voted only in case of default on the dividends.

Promoters further agreed that they would take such action as was necessary to liquidate Peerless, Union and Black Diamond, and transfer their assets to the new company. It was thereupon agreed that the stockholders should deliver to the promoters their 8,500 shares of common stock of Peerless in exchange for 9,000 shares of common stock of the new company, $125,000 cash, 2,225 shares of the cumulative preferred stock of Atlas, which should be accepted at the par value thereof and 3,712½ shares of common stock of Atlas, which should be accepted at a price of $66.66-2/3 per share.

As additional consideration for the exchange, the promoters agreed to cause the new company to reimburse the stockholders for any Federal income tax paid by them because of the transaction.

It was further agreed that the promoters would use their best efforts to exchange the outstanding preferred stock of Peerless, viz., 17,672 shares of the par value of $25 each for the sum of $25 each and an amount of common stock in the new company not to exceed 4,000 shares, and that they would use their best efforts to exchange the 6,390 shares of outstanding minority common stock of Peerless upon the basis of a one-half share of common stock of the new company for each share of Peerless common.

It was further agreed that the promoters would cause Atlas to underwrite 21,732 shares of the preferred stock and 32,198 shares of the common stock of the new company, and that the new company would have $300,000 of working capital. The stockholders agreed that upon the exchanges of stock

all officers of Peerless and Union would resign, and other provisions were made as to details to close the transaction on October 7, 1930.

On the same date, October 7, 1930, J. Edgar Long, as majority stockholder of Union, party of the first part, and H. K. Seligman and W. E. Fletcher, as promoters, parties of the second part, entered into a written contract containing practically the same warranties and agreements as contained in that relative to Peerless. By this contract it appeared that Union had issued and outstanding 3,367½ shares of preferred stock of $100 par value and 4,044 shares of common stock of no par value, and that Long was the owner of 2,198 shares of the preferred stock and 2,824 shares of the common stock. It was agreed that the stockholder should deliver to the promoters his 2,824 shares of Union common in exchange for 8,500 shares of common stock of the new company, and $333,333.33⅓ in common stock of Atlas (par value $100 per share) at a price of $66.66-2/3 per share, and $166,258.42 in preferred stock of Atlas at par.

It was also agreed that Long should deliver to the promoters 2,198 shares of preferred stock of Union in exchange for an equal amount of Atlas, preferred stock and 802 shares of the new company common.

The promoters also agreed to use their best efforts to cause the exchange of the remaining 1,169½ shares of Union preferred for $93,700 in cash, 232½ shares of Atlas preferred, and 585 shares of new company common, and that they would also use their best efforts to cause the exchange of the 1,220 outstanding minority shares of Union common on a

basis of one share of Union for one of the new company common.

Long agreed to enter the employ of the new company, and not to engage in competitive business for 10 years.

On the same day, October 7, 1930, the promoters, H. K. Seligman, and W. E. Fletcher, and the new company entered into a written contract in which it was recited that the promoters owned or controlled substantially all of the outstanding capital stock of Peerless and Union, and desired to exchange same with the new company pursuant to a certain plan of reorganization, and it was agreed that the promoters should exchange their holdings in Peerless and Union as follows: 16,128 shares of Peerless preferred, 14,288 shares of Peerless Common, 3,-367½ shares of Union preferred, and 4,044 shares of Union common for $632,150 in cash, 6,318 shares of Atlas preferred at par, 8,712½ shares of Atlas common at a price of $66.66-2/3 per share, and 32,145.79 shares of new company common. There were further agreements relative to the employment of stockholders in the old companies, and agreements to dissolve the old corporations, acquire their assets and assume their liabilities, and to reimburse stockholders for any income tax imposed upon them from the transaction. Also on October 7, 1930, separate agreements were entered into by petitioner, Eugene Frost and Edward R. Day with the new company and Atlas relative to the reimbursement of income tax imposed on the stockholders on account of the transfers.

Prior to October 7, 1930, the promoters had secured options on practically all of the minority

stockholdings in Peerless and Union on the terms stated in the contracts above mentioned. These options were exercised through the First National Bank of Tamaqua, Pennsylvania, which delivered to Peerless minority stockholders $403,200 and 6,447.79 shares of new company common in exchange for 16,128 shares of Peerless preferred and 5,788 shares of Peerless common. Union minority stockholders received $103,950 and 2,096.50 shares of common stock of the new company for 937 shares of Union preferred and 1,128 shares of Union common.

All of the transfers and exchanges were made as indicated by the above agreements. The assets of the three old corporations, Peerless, Union and Black Diamond, were transferred to the new company and the old companies were dissolved.

Upon the completion of the stock exchanges on October 7, 1930, the shareholdings in the new company were as follows:

	Shares	Shares	Percentage of total
Preferred stock	21,732	.....	
Owned by Atlas	.....	21,732	100%.
Common stock	64,252.54	.....	
Owned by Atlas	.....	37,198	57% plus.
Owned by former stockholders of Peerless and Union	.....	27,054.54	43% minus.

The question has been raised by the respondent as to the ownership of 5,000 shares of the new company common stock which were issued to Seligman and

Fletcher, 2,500 shares to each. Under the agreement which had been entered into between Seligman and Fletcher as promoters and the majority stockholders of Peerless and of Union, only 27,054.54 common shares of the new company were to be issued to such majority stockholders. Atlas contemplated that approximately 65,000 common shares of the new company should be issued. At a meeting of the directors of Atlas on October 2, 1930, a resolution was passed providing in part:

> FURTHER RESOLVED, that Atlas Powder Company, as the holder of all the stock of Peerless-Union Explosives Corporation, now outstanding, hereby consent to the issuance of Peerless-Union Explosives Corporation of said 21,732 shares of 6% Cumulative Preferred Stock and 32,198 shares of Common Stock, and further to the issuance by said Peerless-Union Explosives Corporation of such additional amount of its authorized Common Stock not exceeding, however, 5,500 shares to Harry K. Seligman and W. E. Fletcher, on account of such part of the purchase price payable to them in the course of the acquisition of the shares of Peerless Explosives Company, Black Diamond Powder Company, and Union Explosives Company, as is payable in the stock of said Peerless-Union Explosives Corporation.

It is the uncontradicted testimony of Lyon, the president of the Atlas Powder Co., and of W. E. Fletcher, that the 5,000 shares of stock in question were issued to Seligman and Fletcher to be held by them subject to future directions from the officers of the Atlas Powder Co. The certificates in

question were first turned over to the officers of Atlas and by such officers delivered to Seligman and Fletcher. The reason for the issuance of these shares to Seligman and Fletcher was for the purpose of making it appear that the Atlas Powder Co. was the stockholder of record of slightly less than a majority of the voting stock of the Peerless-Union Explosives Corporation. With respect to the certificate received by Fletcher he testified:

> Mr. Lyon or one of the officers gave it to me and he told me that it was being given to me, and he said it was being given to Mr. Seligman, too, in order to reduce the amount of Atlas holdings in this company for sales reasons, and they expected us to hold it, to be used for the interest of Atlas in any way that they cared us to use it, and we were perfectly willing to do it.

Several months later Seligman and Fletcher were told by the officers of the Atlas Powder Co. that the Atlas Powder Co. released any claim which it might have to the 5,000 shares of stock in question.

From the above quoted evidence we find as a fact that the 5,000 shares of Peerless-Union Explosives Corporation standing in the name of Seligman and Fletcher were beneficially owned by the Atlas Powder Co. until the Atlas Powder Co. waived its claim with respect to those shares.

In exchange for his 2,534.38 shares of the common stock of Peerless the petitioner, on October 7, 1930, received $25,306.67 cash, 625 shares of preferred and 1,344 shares of common stock of Atlas and 2,720.08 shares of common stock of the new company, Peerless-Union Explosives Corporation.

It is the contention of the respondent in this proceeding that these transactions constituted a sale and not a reorganization through the exchange of stock and that there was no plan of reorganization. The evidence does not support the respondent's contention that there was no plan of reorganization. From its inception that plan was that the corporations, Peerless, Black Diamond and Union should be consolidated into a new corporation of which Atlas should own a controlling interest; that at least the majority stockholders of the consolidating corporations should continue as stockholders of the new corporation to be formed. This plan was carried out. As said by the court in *Watts* v. *Commissioner*, 75 Fed. (2d) 981, "The plan of reorganization was the contract made and performed."

Section 112 of the Revenue Act of 1928 reads in part as follows:

RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * *

(3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * *

(c) *Gain from exchanges not solely in kind.*—

(1) If an exchange would be within the provisions of subsection (b) (1), (2),(3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place or organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in

the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

At the consummation of the plan of reorganization, the new company, the Peerless-Union Explosives Corporation was the owner of practically all of the stock and of all of the assets of the old corporations. This clearly establishes a reorganization and consolidation under section 112 (i) (1) (A) of the statute above quoted.

As to whether or not Atlas was a party to the reorganization, it may be said that the entire idea and plan of reorganization was conceived by Atlas; that it was in the line of Atlas' business; and that its promotion and execution were entrusted to its agents, Seligman and Fletcher under general instructions. The plan was developed and formed by Atlas and its agents; cash and its own stock necessary to the accomplishment of the transaction were furnished by Atlas; and it became the owner of the majority of the voting stock and of all of the preferred stock of the new company. In short, Atlas was the mainspring of the entire proceeding and without its participation there would have been no reorganization and consolidation into the new company.

The facts in this respect are quite similar to those in *Fifth Avenue Bank of New York, Executor*, 31 B. T. A. 945. We there held that the term "party to a reorganization" included other corporations than the one reorganized and that, where the corporation

is so intimately connected with the reorganization of other corporations that the reorganization depends on its efforts or support, then such corporation is a party to the reorganization although it is not reorganized itself. The facts in this case are even stronger for the petitioner than those in the above cited case in support of the proposition that Atlas was a "party to a reorganization" for here the evidence shows that Atlas acquired all of the preferred stock of the new company and 57 percent of the common stock, which unquestionably made it a party to the reorganization. See also *Tulsa Oxygen Co.*, 18 B. T. A. 1283; *First National Bank of Champlain, New York*, 21 B. T. A. 415.

In his notice of deficiency the respondent increased the amount of cash received by the petitioner by $700. At the hearing it was admitted by the respondent that this was erroneous. The error will be corrected upon settlement under Rule 50 of the Board's rules of practice.

In the computation of the deficiency the respondent fixed the market value of Atlas preferred stock at $100 per share and of Atlas common stock at $66.66-2/3 per share, being the value fixed by the parties in contracts of October 7, 1930. Petitioner contends that the fair market value of the common stock at the date of receipt by him, October 7, 1930, was only $64 per share, as shown by a sale of 100 shares of Atlas common on the New York Stock Exchange on that date. In view of the fact that the petitioner admits a taxable profit in 1930 equal to the full amount of cash received by him in 1930 from the transaction and of our conclusion that the shares of stock of Peerless-Union Explosives Cor-

poration and of Atlas Powder Co. were received by him in a nontaxable exchange under section 112, it is not necessary to determine the fair market value of the Atlas stock on the date in question.

Judgment will be entered under Rule 50.

(SEAL)

DECISION

Pursuant to the Board's opinion, promulgated September 10, 1935, the respondent herein having on October 2, 1935, filed a notice of settlement and recomputation of tax, and the petitioner having on October 10, 1935, filed an acquiescence in said recomputation, now, therefore, it is

ORDERED AND DECIDED: That there is no deficiency in income tax for the year 1930.

(s) CHARLES P. SMITH,
Member.

ENTERED
OCT. 14, 1935.

(SEAL)

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR

To the Honorable Judges of the Circuit Court of Appeals for the Third Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General and Herman Oliphant, General Counsel for the Department of the Treasury, and W. Frank Gibbs, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That the petitioner on review is the duly appointed and accredited Commissioner of Internal Revenue, holding his office by virtue of the laws of the United States; that the respondent herein, Raymond I. Bashford, filed his income tax return for the calendar year 1930 in the Office of the United States Collector of Internal Revenue for the First District of Pennsylvania, which such Office is located at Philadelphia, Pennsylvania, and was at the time of said filing, and still is, within the jurisdiction of the United States Circuit Court of Appeals for the Third Circuit.

II.

The nature of the controversy is as follows, to wit: The Commissioner of Internal Revenue deter-

mined a deficiency in income tax against the above-named respondent on review, Raymond I. Bashford, for the calendar year 1930 in the amount of $35,941.63 and on March 1, 1933 in accordance with Section 272 of the Revenue Act of 1928 sent to the taxpayer, respondent herein, by registered mail, a notice of said deficiency for the calendar year 1930.

On April 27, 1933, the taxpayer filed with the United States Board of Tax Appeals his petition whereby he appealed from the said notice of deficiency for the year 1930 to the said Board. The appeal bears Docket No. 71565. The cause was heard on December 10, 1934 and on September 10, 1935 the Board promulgated its opinion, which is reported in 33 B. T. A. No. 3, and decided the controversy in favor of the taxpayer. A final order of the Board, based thereon, was entered on October 14, 1935, and ordered and decided that there is no deficiency for the year 1930.

The questions presented are:

(1) Was the exchange by the taxpayer in 1930 of his stock of Peerless Explosives Company for cash, preferred and common stock of the Atlas Powder Company and common stock of Peerless-Union Explosives Corporation (the new company) made pursuant to a nontaxable reorganization and (2) granting the exchange was made pursuant to a nontaxable reorganization, was Atlas Powder Company a party to said reorganization?

During the early part of the year 1930, the President of Atlas Powder Company engaged Messrs. Fletcher and Seligman, two former employees of

the Atlas Powder Company to contact stockholders of the Peerless Explosives Company and the Union Explosives Company for the purpose of determining whether said stockholders would be interested in disposing of their holdings in said corporations.

These gentlemen did not divulge to the stockholders just whom they represented except to say that they represented a large corporation with responsible financial backing, nor did they offer a definite plan, either in the nature of a reorganization or a sale to the stockholders. Messrs. Fletcher and Seligman did secure options from the stockholders wherein said stockholders agreed to dispose of their holdings.

On September 22, 1930 a new corporation, the Peerless-Union Explosives Corporation, was organized and the Atlas Powder Company acquired all of its capital stock consisting of 10 shares of common and 10 shares of preferred stock, for which Atlas paid $1,1001.00. Some time subsequent to September 22, 1930 the original capital stock of the new company was increased and on October 2, 1930 the officers of Atlas were empowered and directed to invest in capital stock of the new company to an aggregate of 27,732 shares of preferred stock and 32,198 shares of common stock, and in consideration therefor to deliver to the new company $960,560.25 in cash, 6318 shares of Atlas preferred stock on a basis of $100 per share and 8712½ shares of common stock of Atlas on a basis of $66.66-2/3 per share. The officers of Atlas made the investment as directed.

On October 7, 1930 the taxpayer was the owner

of 2,534.38 shares of common stock of the Peerless Explosives Company, which he exchanged for $25,006.67 cash, 625 shares of preferred stock and 1,344 shares of common stock of the Atlas Powder Company and 2,720.08 shares of common stock of the new company, Peerless-Union Explosives Corporation. The taxpayer included as income on his income tax return filed for the year 1930 the amount of cash received on the exchange, namely, $25,006.67. The Commissioner, in computing the taxpayer's income for the year 1930 included, in addition to the cash received, the fair market value of the preferred and common stock of the Atlas Powder Company received on the exchange in the respective amounts of $62,500.00 and $89,600.00, holding that said stock constituted "other property" under Section 112 (c) (1) of the Revenue Act of 1928.

At the hearing before the Board the petitioner herein took the position (1) that there was no statutory reorganization involved in the transaction but rather a sale and (2), should the Board find that Peerless Explosives, the Union Explosives Company and the Peerless-Union Explosives Corporation did indulge in a statutory reorganization that Atlas Powder Company was not a party to said reorganization.

On or about October 7, 1930 Peerless-Union Explosives Corporation issued to Messrs. Fletcher and Seligman each 2500 shares of stock in said company. The Board found that the shares so issued totalling 5,000 were in fact owned by the Atlas Powder Company. Without such holding said Atlas Powder Company would not be in control of the voting stock of the new company.

The Board held that the transaction here involved was a nontaxable exchange made pursuant to a plan of reorganization and that Atlas Powder Company was a party to the same. With this holding it was not necessary for the Board to find the fair market value of the preferred and common stock of Atlas Powder Company at the date of exchange received by the taxpayer.

III.

The petitioner herein being aggrieved by the findings of fact and conclusions of law made by the Board of Tax Appeals, and injured thereby, desires to obtain a review of said findings of fact, conclusions of law, order and decision by the United States Circuit Court of Appeals for the Third Circuit, and as reasons for such review alleges that the Board committed the following errors:

(1) The Board erred as a matter of law in holding that the transaction whereby Bashford exchanged his common stock of the Peerless Explosives Company for cash, common and preferred stock of the Atlas Powder Company and common stock of the Peerless-Union Explosives Corporation was made pursuant to a plan of reorganization.

(2) The Board erred as a matter of law in failing to find that the aforesaid exchange constituted a sale.

(3) The Board erred as a matter of law in holding that the Atlas Powder Company was a party to a reorganization.

(4) The Board erred in failing to find that the

Atlas Powder Company was not a party to the reorganization.

(5) The Board erred in failing to find that the fair market value of preferred and common stock of Atlas Powder Company received by respondent in the exchange constituted "other property" and was taxable income.

(6) The Board erred in holding that the Atlas Powder Company was the actual owner of 5,000 shares of common stock of the Peerless-Union Explosives Corporation which were issued by said corporation to Messrs. Seligman and Fletcher.

(7) The Board erred in failing and refusing to find that the aforesaid 5,000 shares of common stock of the Peerless-Union Explosives Corporation were in fact and in law owned by Messrs. Seligman and Fletcher, of which 2,500 shares were issued to each respectively.

(8) The Board erred in failing and refusing to find and determine that respondent, Bashford, owed a deficiency in Federal income tax for the year 1930 in the amount of $35,941.63, except in so far as the error admitted by petitioner herein in the proceedings before the Board of Tax Appeals, wherein petitioner herein admitted the amount of cash received by Bashford was $700.00 less than the amount shown in the notice of deficiency.

(9) The Board erred in determining that respondent, Bashford, owed no deficiency in Federal income tax for the year 1930.

WHEREFORE, the Commissioner petitions that

the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Third Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) FRANK J. WIDEMAN,
Assistant Attorney General.

(Signed) HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

OF COUNSEL:

W. FRANK GIBBS,
Special Attorney,
Bureau of Internal Revenue.

United States of America,
District of Columbia, ss:

W. Frank Gibbs, being duly sworn, says that he is a Special Attorney for the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to these he believes it to be true.

(Signed) W. FRANK GIBBS.

Sworn and subscribed to before me this 4th day of January, 1936.

(Signed) GEORGE W. KRIES,
Notary Public.

My commission expires Nov. 16, 1937.

NOTICE OF FILING PETITION FOR REVIEW

To:

Mr. Raymond I. Bashford,
C/o The Atlas Powder Company,
Wilmington, Delaware.

You are hereby notified that the Commissioner of Internal Revenue did, on the 6th day of January, 1936, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 11th day of January, 1936.

HERMAN OLIPHANT
General Counsel for the Department of the Treasury.

Personal service of the above and foregoing no-

tice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 13 day of January, 1936.

(Signed) RAYMOND I. BASHFORD,
Respondent on Review.

NOTICE OF FILING PETITION FOR REVIEW

To:
Mr. Raymond I. Bashford,
260 South Broad Street,
Philadelphia, Pa.

Mr. Walter G. Moyle,
1109 Earle Building,
Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 6th day of January, 1936, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 6th day of January, 1936.

HERMAN OLIPHANT
General Counsel for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this sixth day of January, 1936.

(Signed) RAYMOND I. BASHFORD,
Respondent on Review.

WALTER G. MOYLE,
Attorney for Respondent on Review.

STATEMENT OF EVIDENCE

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable Charles P. Smith, Member of the Board of Tax Appeals, on December 10, 1934, at Washington, D. C.

At the aforesaid hearing the parties had entered into a stipulation of the facts and the stipulation, together with all exhibits, was offered in evidence and received by the Board. After the receipt of the stipulation, the following took place in the hearing:

MR. MOYLE:

The stipulation just received is entered into with the following addition, agreed to between counsel:

"Paragraph XXIX and XXXV thereof refers to the number of shares of Peerless-Union issued in connection with the acquisition by Peerless-Union of the outstanding minority of Peerless Common and

Preferred Stock. It is agreed that the figure of 673.27 of Peerless-Union Stock in Paragraph XXXV included the figure 301 of common stock of Peerless-Union referred to in the latter part of Paragraph XXIX. The difference between these figures is the amount of Peerless-Union Stock used in the payment of accrued dividends in the 1544 shares of Peerless Preferred stock included in this outstanding minority."

THE MEMBER:

Does that stipulation amend the petition?

MR. GIBBS:

That amends the stipulation. There was a manifest error in the stipulation or something that needed the explaining because they were at variance. This stipulation is to take care of that variance.

MR. MOYLE:

I would like to call Mr. Lyon to the stand.

Thereupon, to sustain the issues raised in the petition, Leland Lyon was called as a witness by and on behalf of the petitioner and having been first duly sworn, testified in substance as follows:

Direct Examination

I, Leland Lyon, am President of the Atlas Powder Company of Wilmington, Delaware, having held that position since 1927; that the Atlas Powder Company is engaged in the manufacture, distribution and sale of high explosives, blasting supplies and chemicals, operating quite generally throughout the United States, and had for a number of years prior to October, 1930 sold blasting supplies to the Peerless Explosives Company and the Union Explosives Company averaging for several years from 1.6%

to 3.3% of total sales and as high as 15% on blasting and chemical sales; that I have known both W. E. Fletcher and H. K. Seligman since 1913; that W. E. Fletcher had been employed by the Atlas Powder Company from 1913 to 1927 when he retired from that company; that he (Fletcher) had held various positions from Superintendent of the plant to Assistant General Manager of the High Explosive Operating Department; that H. K. Seligman was engaged in the wholesale hardware business and the sale of mine supplies at Tamaqua, Pennsylvania, operating under the name of Seligman and Company; that the Atlas Powder Company had purchased goods continuously from Seligman and Company from 1913 to date; Seligman had been the agent for Atlas Powder Company in the sale of explosives in the State of Pennsylvania.

In January 1930, several of the officers of the Atlas Powder Company including myself conceived the idea which later resulted in the formation of the Peerless-Union Corporation, which company was incorporated under the laws of Delaware on September 22, 1930. The idea conceived by the officers was to have the new company take over the Peerless Explosives Company, the Union Explosives Company and the Black Diamond Powder Company; that they believed it would be better instead of carrying on the negotiations in the name of the Atlas Powder Company to conduct the matter by the use of intermediaries, so Messrs. Fletcher and Seligman were engaged to carry on the negotiations. These negotiations were conducted by Seligman and Fletcher at the direction of the officers of the Atlas Powder Company and the negotiations culminated in this plan of reorganization on October 7, 1930 and

that the subsequent actions of Fletcher and Seligman were solely for the account of Atlas; that I told Messrs. Fletcher and Seligman if the plan of reorganization should be completed, they were to be officers in the Peerless-Union Explosives Corporation, Mr. Seligman to be President and Treasurer and Mr. Fletcher, Vice President and Secretary. After October 7, 1930 when the plan was completed they were made President and Vice President of the Peerless-Union Explosives Corporation and also directors; that Atlas Powder Company being in a dominating position elected three directors of the five of the new corporation, the three being Seligman, Fletcher and a man by the name of Pollock from the Atlas Powder Company's Offices at Wilmington, Delaware, who was a director of the high explosives department.

That Fletcher and Seligman received no compensation for their services up to October 7, 1930 but immediately after October 7 when they were elected officers of the Peerless-Union Explosives Corporation they received a salary and there was also placed in their name certain shares of the common stock of the Peerless-Union Explosives Corporation; that the placing of said shares in their names was in no sense compensations but that as they were accepting these new positions Atlas Powder Company felt it was highly desirable to have some stock in their names. That the plan arrived at in the conference with Fletcher and Seligman was that Peerless-Union was formed as a subsidiary of Atlas, which furnished all the cash and some 6,000 shares of its own preferred stock and 8,000 shares of common stock in making the new corporation possible; that all the negotiations with the stockholders of the old com-

panies were conducted through Fletcher and Seligman, who were representing the Atlas Powder Company in all the contracts which were entered into, the same being Exhibits C, D and E of the stipulation.

Q. Will you state why Atlas Powder Company was not disclosed as the principal in those original contracts and exchanges?

A. We felt that it was much better to deal with Messrs. Seligman and Fletcher as intermediaries rather than to disclose to the old Peerless Company and the old Union Company stockholders who were really the principals in this transaction.

Q. You had dealings before of that type?

A. Yes, indeed.

Q. You feared at the outset that the extent of your interest would become known in the acquisition of the Peerless and Union stock?

A. It was not what we had to fear but it was what we believed would make for smoother operation.

Q. Was it because of your desire to secure the options with less trouble and not be held up by certain stockholders? What was the reason?

A. We felt that there were two men that we had been acquainted with over a very long period of time and that they could conduct the negotiations, not being in the Atlas Powder Company's main office in Wilmington at that moment, to carry on those negotiations in a much better way than we as officers could.

That Messrs. Seligman and Fletcher were on good terms and had the confidence and good will of the principal stockholders of the Peerless and Union Companies; that I personally participated and had directly under by charge and supervised for Atlas the negotiations and the subsequent transfers and exchanges; that Atlas desired to cause this reorganization because Atlas was selling to Peerless and Union a substantial amount of blasting supplies and chemicals and Atlas wished to retain that business, which was highly competitive, and also Atlas wished to acquire the direct high explosives business of those three companies, Peerless, Union and Black Diamond; that Atlas feared that if some plan was not effected, competition might take some of this business away.

That in effecting the plan, it was made known to each of the stockholders of Peerless and Union that their participation in these exchanges was based upon all various steps being consummated up to the conclusion of the plan which took place on October 7th; that the stockholders of the so-called majority group of both the Peerless and the Union agreed to deposit their stock and agreed to go through with certain agreements provided the whole plan was consummated; that this was also made known to the minority stockholders that their exchange was conditioned upon the successful completion of the plan.

That the Peerless Union Corporation was incorporated on September 22, 1930 and all of its then issued stock, consisting of ten shares of preferred and ten shares of common, were issued to the Atlas Powder Company for a consideration of $1,000 for the preferred and $1.00 for the common stock.

Thereafter, the capitalization was increased and the entire issue of preferred stock, consisting of 21,732 shares were issued to the Atlas Powder Company; that 32,198 shares of common stock, plus 5,000 shares, was received by the Atlas Powder Company.

Q. Explain what you mean by 5,000 shares.

A. The Atlas Powder Company planned that there would be 65,000 shares of authorized common stock and Atlas further agreed to underwrite 32,198 shares of the common stock and the stock then accruing to the parties, the majority and the minority stockholders in Peerless-Union, called for all that stock with the exception of about some approximately 5500 shares. The whole deal was consummated on Oct. 7 and there remained about—there were a few stockholders who did not come in. The plan was closed and there were about 5,000 shares of common stock remaining and Atlas believed it was better to issue that 5,000 shares of stock at 2,500 shares each to Seligman and Fletcher than to issue it to Atlas Powder Company. We did not care for any further dominating common stock position. They had become directors and officers of the new Peerless-Union Company and we believed that it would be a good thing for them to have some of that stock.

Q. The 32,198 shares of Peerless-Union common were transferred in the name of Atlas Powder Company?

A. Yes.

Q. The 5,000 additional shares, being in certificates of 2,500 each of Peerless and Union common to Messrs. Seligman and Fletcher in

the name of Fletcher and Seligman respectively as nominees of the Atlas Powder Company?

A. We issued that directly to them.

Q. Did they hold the stock for their own account or for the Atlas Powder Company?

A. They held the stock for the account of the Atlas Powder Company.

* * * * *

Q. Will you explain why the stock was placed in the names of Fletcher and Seligman?

A. I have already said that I did not feel that it was necessary for Atlas to carry any further dominating amount of the common stock.

Q. Do you mean as a record-holder or as a fact?

A. As a record-holder.

Q. Or in fact?

A. In fact the stock was ours. As a record-holder it was in their name.

* * * * *

That I first conferred with Messrs. Seligman and Fletcher in January 1930 and I principally handled these negotiations until October 7, 1930 and that Messrs. Seligman and Fletcher worked under my direction and they represented me during the entire period.

That I never at any time had any written agreement with Fletcher and Seligman regarding compensation for services in connection with this so-called plan of reorganization, but Atlas thought after the plan had been consummated that it would be proper to place some stock in their names as our

nominees; and that Atlas had it put in their names as nominees of Atlas and without consideration.

That the Atlas Powder Company paid them no consideration up to October 7, 1930 when the plan was consummated and they were made officers of the new company. That Seligman and Fletcher were first advised about October 2 that they would receive common stock in the new company and that the certificates for 2,500 shares were delivered to them either on October 7th or October 8th by the officers of Atlas, the stock certificates having been delivered first to Atlas by the new company. That the Atlas Powder Company dominated the policy of the new company by its control of the Board of Directors and officers of the new company.

Q. Will you explain why Atlas was entitled to those 5,000 shares of Peerless-Union stock?

A. The definite contracts between Messrs. Fletcher and Seligman, on the one hand, and the other parties outside of Atlas had been complied with, with the exception of a few shares of stock when this plan was closed on October 7th —a few shares of Peerless Company stock which had not been turned in, and an approximate number of shares of stock of Peerless-Union were reserved for that purpose, so that as and when this plan terminated on October 7th, and as and when the Peerless-Union directors could later acquire those few shares of stock under any plan, whether it would be cash or some further amount of Peerless-Union stock, that would be available, and some was acquired later on, some for cash and some for stock.

Q. Did you consider on the consummation of

this plan on October 7th, 1930, that Atlas was entitled to all of the stock of Peerless-Union Corporation except that which was due to be given to the old stockholders of Peerless-Union?

A. Yes.

That the common stock of the new company on October 7 had no tangible value and the tangible assets of the new company on October 7 were not sufficient to equal the total amount of the issued preferred stock. That after October 7 the new company conducted the same business as had previously been conducted by the three former companies.

Q. Did you receive any acknowledgment from Messrs. Seligman and Fletcher on or after October 7 that they held this stock for account of Atlas?

A. Not written; only verbally.

Q. You did receive verbal notice; they said they were holding 5,000 shares of stock?

A. Yes.

Q. Have you read the stipulation that has been introduced in evidence in this case? Are you familiar with it?

A. I am fairly familiar with it.

Q. Can you state of your own knowledge whether or not the various exchanges and transfers that took place as outlined in that stipulation are in accordance with and a part of this so-called plan of reorganization that you authorized Messrs. Seligman and Fletcher to bring about?

A. They are.

Cross Examination

W. E. Fletcher was not engaged in active business between the years 1927 and 1930; that he resided in Philadelphia and during the period from 1927 to January 1930, he had no relationships or contacts with the Atlas Powder Company. That from 1913 to 1927 he was in the employ of the Atlas Powder Company; that he was Superintendent, a part of the time engaged in the manufacturing and of the business but had no connection with the sales department except in matters of inter-departmental cooperation. That the manufacturing plant of the Peerless Explosives Company was at White-Haven, Pennsylvania, but its principal offices were at times at Philadelphia and Wilkes-Barre, Pennsylvania. That the manufacturing plant of the Union Explosives Company was at Leroy, New York and its principal office at Clarksburg, West Virginia; that the Black Diamond Powder Company manufactured black blasting powder and had its plant at Suscon, Pennsylvania; and that its stock was entirely owned by the Peerless Explosives Company; that Atlas had been selling its products to Peerless, Union and Black Diamond for approximately ten years; that these companies were competitors of Atlas in so far as selling the finished product of high explosives and black blasting powder but that for a period of approximately ten years those companies were purchasing the ingredients such as chemicals, from Atlas that went into the finished product; that these companies did not care to manufacture those chemicals themselves; that Atlas sold them under short term arrangements never by contract until the year 1930; that neither Mr. Seligman nor Mr. Fletcher

were stockholders in any of those companies; that Mr. Seligman conducted a wholesale hardware store at Tamaqua, Pennsylvania and he sold to the public explosives manufactured by Atlas as their representative in that vicinity; he had no contract with Atlas since the year 1914 nor did he receive a salary. These sales of Atlas product were made upon a commission basis; that I conceived the idea of putting these three companies together under a plan of reorganization, the Peerless, the Black Diamond and the Union, which Atlas would control.

That it was my idea from the inception to have Atlas form a corporation which it would control, to acquire the properties and assets and business of these three companies; that Atlas wanted to acquire these three companies on the best basis it could and I first communicated my idea to Seligman and Fletcher. I called them in because I knew them so well and believed it would be better to do what we were attempting to do through them as intermediaries rather than do it directly; that Atlas did not go directly to the officers and stockholders of the three companies because Atlas thought Seligman and Fletcher knew them better and Atlas believed it would be better to conduct the negotiations through them.

Atlas had no written contract with Seligman and Fletcher and I told them that Atlas wanted to include in the new corporation these three companies. The instructions I gave Seligman and Fletcher were to see if they could make an acquisition of those three companies, and, if so, to let me know what kind of a deal they could make, and if we liked it we would go through with it. They were instructed

to approach all possible stockholders of the three companies.

Q. You were interested in getting the stock of those companies rather than the assets of the companies?

A. Naturally, when we wanted to get the companies we went to the owners of the stock.

Q. You were not interested in buying all the assets of the company for a particular lump sum of money, were you?

A. We wanted their entire assets and their entire business, also, in this new corporation.

Q. Go ahead. What were your instructions, to approach stockholders of those companies?

A. In an effort to acquire all the assets and all the business of those three companies.

Q. What instructions did you give Messrs. Seligman and Fletcher to convey to those stockholders? That you were ready to pay so much cash or what?

A. My instructions were made along the line of getting them to make an offer.

Seligman and Fletcher reported back to me they were making progress, but I can not recall what happened day by day between January and October 7, 1930. We held many conferences.

Q. When you first approached Mr. Seligman and Mr. Fletcher to get in touch with the stockholders, did you tell Mr. Fletcher to suggest to those stockholders that a new company would be formed and that you would give so much cash and so much stock of the new company and so much Atlas stock preferred and common to

those stockholders? Did they go out from you with those instructions? How did all of this develop?

A. They went out with instructions to get an offer from those stockholders to sell—to turn over—to do something—to form a new company and it finally developed as shown by the contracts, but I cannot tell you what thoughts may have been in the minds of our negotiators. All I wanted to know was could we do the work; could we accomplish what we were after, and finally it happened on Oct. 7th.

That Atlas bought the assets and business of Peerless and Union, and to put it more in sequence, Atlas Powder Company caused the formation of Peerless-Union Corporation as a subsidiary to Atlas to acquire the assets and business of Peerless, Black Diamond and Union, all of which was eventually done; that Atlas had no written arrangement with respect to compensation with Fletcher and Seligman; that they were told they would become officers and directors of the new company when the plan was completed, they were made officers and directors and started from October 7th, the day the plan was made; that if the plan had not gone through, Fletcher and Seligman would not have received anything; that on October 8th, 1930, I conferred with Seligman and Fletcher and made arrangements with them as to their salaries they would receive as President and Vice President respectively.

I attended the special meeting of the Board of Directors of Atlas Powder Company on October 2, 1930, at which Atlas consented to the issuance to it of 21,732 shares of the preferred stock and 32,198

shares of common stock of the Peerless-Union Explosives Corporation and also to the issuance of not more than 5500 shares of common stock to Harry K. Seligman and W. E. Fletcher; that on October 2nd, 1930, we felt reasonably sure this plan would be consummated and this 5500 shares of stock had not been issued and Atlas did issue that stock, 2500 shares each to Seligman and Fletcher as nominees of Atlas Powder Company; that Atlas did not care to have any greater dominating position than it had, and we wanted them as officers and directors of Peerless-Union to hold that stock in their name; that the certificates each for 2500 shares were issued on October 7th, but I believe delivery was made to myself or to another officer of Atlas who, in turn, delivered them to Seligman and Fletcher either on October 7th or 8th. I presume they were made out and issued at the same time the other shares were.

Q. Who voted that stock, those certificates of 2500 shares each, at subsequent meetings of the corporation?

A. Messrs. Seligman and Fletcher. I might add they would have been qualified to use them to vote on. Whether they ever voted them at a meeting or not I don't know.

That Atlas went out into the open market and bought all the common stock of Atlas used in the transaction and some of the preferred stock while some of the preferred stock used was newly issued stock.

I do not recall that I ever instructed Seligman and Fletcher in their negotiations that Atlas was ready and willing to pay all cash for the stock of

the three companies; that if the stockholders had insisted on selling their stock for cash the plan would not have failed if the amount of cash had met with Atlas' approval; it is my recollection, but the record will show, that when the plan was closed on October 7 nobody had received all cash; that I believe some of the stockholders of the three companies simply got cash and stock of the new company without getting any Atlas preferred or common stock.

That everything embodied in the contracts of October 7, 1930, had not wholly been agreed upon until approximately October 6, 1930; they had been in the making and certain things accomplished, dependent upon all agreements being carried out in toto; that some of the things had been contingently agreed upon for a matter of thirty days ahead of October 7th.

That the accounting firm of Barrow, Wade, Guthrie & Company was engaged about one month prior to October 7th to audit the books of these constituent Companies, as consummation of the plan of reorganization was in part contingent upon a verification by Atlas of representations made to Messrs. Seligman and Fletcher as to the amount and nature of the assets and liabilities of Peerless and Union. Atlas sought legal advice from attorneys in connection with the matter shortly after July 1, 1930; that the general idea of forming a new corporation was conceived by Atlas' own officers and Messrs. Fletcher and Seligman.

There was no objection to Atlas approaching the stockholders of the three companies directly, but Atlas believed they could get a better price by having Fletcher and Seligman approach the stockholders; that there was no written contract between Atlas

and Seligman and Fletcher, but there was a verbal arrangement that if the plan of reorganization was consummated, Seligman and Fletcher would become officers in the new corporation, and when the plan was consummated they did become officers and directors in the new corporation; at the outset of the negotiations, I had no idea what form of organization or reorganization it would take when I first talked with Seligman and Fletcher, that all developed as time went on; I told them to go out and see what kind of an offer they could get from the stockholders of the Peerless Company and the stockholders of the Union Company; they went out and reported back to me; the stockholders made a definite offer to sell their stock, but I do not remember from memory what the offer was.

Q. That was for so many dollars?

A. It was generally a question of a combination of dollars and securities, of the Atlas Powder Company and of a new company to be formed.

Q. These stockholders came back to Atlas, through Messrs. Seligman and Fletcher, and told them, "we will take so much cash, so much stock of Atlas, and so much stock of a new company if Atlas will form it"?

A. They did.

That was one of their offers; they made so many that I can't remember them; the different stockholders did not make different offers, the majority of Peerless made a similar offer and the majority of Union made an offer.

There was no written contract at any time between

Atlas Powder Company and those corporations or those corporations' stockholders; there was no written contract at any time between Atlas Powder Company and the Peerless-Union Explosive Company, the new company; I have no recollection of any.

The majority group of Peerless was made up of Eugene Frost, Day and Bashford, they controlled 8500 shares of common stock; we received offers from the minority group, and prior to the final consummation of October 7, 1930, the minority group was offered a certain basis of exchange or purchase and a great majority of those minority stockholders did accept the plan by October 7 when the plan terminated, and all agreements were carried through.

Redirect Examination

That J. Edgar Long was President of Union before October 7th and was the principal stockholder of Union; that Eugene Frost was president of Peerless prior to October 7th and one of the majority stockholders therein; that Bashford was an officer of Peerless.

The Atlas Powder Company felt that it did not want as much stock in its name as would be the case with what Atlas received directly under its contracts, plus the amount that was later turned over to the nominees; that I didn't intend to say on cross examination that the 5000 shares issued to Seligman and Fletcher didn't belong to Atlas, that the stock belonged to Atlas and the ownership of Fletcher and Seligman was purely nominal; that the plan which was finally consummated on October 7th, 1930 became crystallized substantially about the first week in September, 1930; that there were no signed con-

tracts between Atlas in its own name and the Peerless and Union stockholders, but in signing the contracts Seligman and Fletcher were acting for Atlas.

Recross Examination

That the stock when issued to Fletcher and Seligman belonged to Atlas. I say that because the general plan of about 65,000 shares of common stock was the amount authorized to be issued approximately; the contracts made by Seligman and Fletcher with the majority and minority stockholders of Peerless and Union called for the issuance of a certain number of shares to them and, after eliminating those shares issued direct to Atlas, there was left about 5500 shares of stock which we estimated on Oct. 2 as being over and above what was called for in the contracts; that belonged to the Atlas Powder Company but we did not think it was advisable to issue that in the name of Atlas; we preferred for many reasons to issue that in the name of our nominees, Messrs. Fletcher and Seligman.

Atlas underwrote 32,198 shares of common stock of the new corporation and all of its preferred, but Atlas was entitled to the remaining common shares after that underwriting.

I believe the authorized shares of common stock were 100,000 of which 65,000 was to be issued. All of the preferred and 32,198 shares of common were to go to Atlas, for which Atlas was to pay some $900,000 cash and so much of its preferred and so much of its common stock. We believed the balance of the common stock belonged to Atlas and Atlas did cause 5,000 shares of it to be issued to Messrs.

Seligman and Fletcher. It was not always understood that the balance of this stock was to go to Fletcher and Seligman.

Q. Where did you get your authority for saying you always felt the balance of it was Atlas'? Where did they get the authority or their ownership over the balance of it?

A. The Atlas had dominated the whole plan of this reorganization by putting up some $960,000 in cash. It had supplied 6000 odd shares, of its preferred stock and 8,000 shares of its common stock.

It was stated in the contracts what Atlas was to give and what it was to get, but there were 65,000 shares of common stock to be issued and Atlas caused 5,000 shares of it to be issued to its nominees; of the 65,000 shares, 32,198 was issued to Atlas Powder Company, 27,145.79 were issued to the stockholders of the Peerless and Union Companies under the contracts, leaving a balance of 5,673.27 shares undisposed of of the authorized stock to be issued; that Atlas felt it owned these remaining shares and could dictate who was to get them.

On October 2nd, Atlas in its directors' meeting believed that there would be about 5500 shares not required under the plan and at that time caused 5,000 shares, 2500 each, to be issued to Seligman and Fletcher as nominees of Atlas. The certificate did not say "Nominees" and Seligman and Fletcher did not assign the stock certificates.

Redirect Examination

My testimony so far is that Atlas was entitled,

under its plan of reorganization, to all the stock of Peerless-Union, subject to this liability, through Messrs. Fletcher and Seligman, to give in exchange twenty-seven thousand plus to the stockholders of Peerless and Union to cover the exchange; that, therefore, any stock remaining belonged to Atlas.

Thereupon, W. E. FLETCHER was called as a witness by and on behalf of the taxpayer and having been first duly sworn testified in substance as follows:

Direct Examination

My name is W. E. Fletcher and on Oct. 7, 1930, I was Vice-President and Secretary of the Peerless-Union Explosives Corporation, and was given a salary as Vice President. I was employed by the Atlas Powder Company from 1913 to 1927, first as plant manager and later as Assistant General Manager of operation of all plants, retiring voluntarily in 1927. That J. Edgar Long was President of Union Explosives Company prior to October 7th; that Ed Day was President and Eugene Frost was Vice President of Peerless Explosives prior to October 7th; that I believe Bashford was Vice President of Peerless; that these were the same men I dealt with as the majority stockholders of the old companies; that on and after October 7th I was secretary of Peerless and Union Companies and also the new company, the Peerless-Union Explosives Corporation.

That at all times material to the contracts in-

volved I was acting for the Atlas Powder Company, my activities commencing January, 1930 and continuing through October 7, 1930. At no time did I have a contract in writing with the Atlas Powder Company or Peerless-Union in respect to compensation for services rendered in connection with the plan of reorganization. However, Mr. Lyon told me that if the plan went through, he would give me a position as an officer in the new company to be formed; that I have been acquainted with Mr. Seligman and did business with him for Atlas since 1906 and frequently visited him at Tamaqua, Pennsylvania which was the district where many of the stockholders of Peerless and Union Companies were located.

The Tamaqua Bank at Tamaqua, Pennsylvania, was used as the depository to receive from us the cash and stock and to receive from stockholders their certificates, the Bank agreeing to distribute in accordance with the plans and arrangements to be made with the stockholders. This bank was selected for convenience to stockholders and because Seligman and I knew the people well; it was the bank Seligman used.

I secured options on the stock of the minority and we dealt with them in accordance with the written contracts on the same basis; all of the minority accepted in accordance with the plan except a few scattered Peerless holders did not come in, but all of Union minority came in; by "came in" I mean they all accepted.

The bank at Tamaqua had a list of all stockholders and they kept their records in accordance with the stock that came in and the payments that went

out. The majority group were paid in Philadelphia on October 7th. They would hand in their certificates and receive their payments for them on October 7th, the day of which the reorganization was closed or completed.

After January 1, 1930, I first became associated with this matter and had a number of conferences with either the stockholders or officers of the Atlas Company; that Mr. Seligman and I went down at the request of Mr. Lyon and talked over the general matter, and Mr. Lyon told us that he would like to do this, and he wanted to do it through forming a new company; that he did it that way because he knew from his experience that that was the better way to do it, which we agreed to also; from talking with Mr. Lyon, we knew from the start, the fundamental plan was the exchange of stocks because we knew that was the proper way to handle this proposition; that there was no chance for Atlas to have carried out this transaction entirely through cash for others had tried that, and these people would not have sold for cash, except some enormous sum that would allow them to retire from the business; they did not want to sell for cash. The majority stockholders of Peerless and Union insisted on a continuity of interest in the new organization.

The contract designates me as a promoter. Throughout the deal I was representing Atlas but we did not disclose this fact because we felt it might be detrimental to the plan to have it known Atlas was interested in it. I speak for Seligman too, who always worked with me. Atlas would not have gone through with the deal unless they understood they would own or control the majority of the stock.

That I did not know I was to get any stock in the new company until October 7, 1930, when the certificate for 2500 shares was handed to me; that neither by contract nor word of mouth had any promise been made to me that any shares would be issued to me; that I did not consider these shares were given me as a consideration for services I had rendered; that I immediately upon receipt of the stock communicated to the officers of Atlas Powder Company that I would hold the stock as Atlas' nominee; that the stock at all times was accessible and subject to Atlas' dictation.

That the officers of Atlas advised me that the general purpose of the plan was "to hold the large amount of business which they did with these companies and which was apt to be lost at any time, and another was to increase their general explosives business in a very vital territory which was very helpful to their company".

That we always considered the formation of Peerless-Union was the basis of the whole plan from the very start, and that Atlas must control it and otherwise Atlas said they would not have completed the deal or gone through with it; that the exchanges and transactions covered by the stipulations were the essential parts of the plan.

Q. Can you state of your own knowledge whether the plan that was carried out and consummated on October 7th was crystallized in substantially its final form at a prior date; that is, prior to October 7th, 1930?

A. Yes; it basically was.

Q. How long before, would you say, about?

A. Well, we knew how this plan was going

to develop, how it would go basically, in the spring.

There were several details to be worked out, but as soon as they were worked out and completed, it went through on October 7th.

At the close of business on Oct. 7, 1930, there were 602 shares of common stock and 1,544 shares of preferred stock of Peerless Explosives Company outstanding, which we were not able to acquire. About a week or ten days subsequent to October 7, 1930, the Board of Directors of Peerless-Union authorized the President to acquire this outstanding stock on such favorable terms as he could arrange. The President had me to do this work because I was in touch with these stockholders, knew them well and had handled most of the details of the transactions with them.

I was instructed to buy this stock for cash or exchange on any basis that seemed fair and reasonable. No specific amount was set, but we preferred to pay stock to conserve our cash position as much as we could. So I acquired that stock for the Peerless-Union Explosives Company by giving stock of the latter company, when they would take it. In the course of three months we had all of this stock; some of it was acquired outright for cash without any exchange of stock. The acquisition of this particular stock had nothing to do with the plan of reorganization, "it was just to clean up and close the book". I only consulted with the directors of Peerless-Union from whom I received my sole authority. I had all of this stock in by December, 1930, as I remember, having acquired the first share about a week after the close of the plan.

Peerless-Union furnished the cash through the Bank at Tamaqua, and when I purchased this stock, the Bank arranged to pay for it. The Bank arranged for them to come in and get the cash out of the money which was provided for by Peerless-Union. The cash used in the transfers prior to October 7th was entirely supplied by Atlas; after October 7th by Peerless-Union.

The figure "Peerless-Union common, 2,096.50 shares" appearing near the bottom, right side of Exhibit "P" of the stipulation represents the amount of stock given in exchange for Union Preferred and an additional amount transferred to take care of the back dividend on the preferred stock of Union at the rate of $50 per share that had accrued and was in arrears, that one share of Union was exchanged for one share of Peerless-Union; that the difference between the amount necessary for that exchange and the figure of 2,096.50 is the amount necessary to take care of the dividend adjustment on the preferred stock of Union. The figure 6,477.79 shares of Peerless-Union appearing near the bottom in the right-hand side of Exhibit "O" of the stipulation includes the amount of stock necessary for the exchange of Peerless-Union and Peerless Explosives at the rate of one-half share of Peerless-Union for one share of Peerless Explosives, plus the amount necessary to take care of the arrears of dividends on Peerless preferred stock.

The delay in dissolving Peerless Explosives until December 31, 1931, was due to the failure of the attorney to file the certificate of dissolution, the certificate, however, having been turned over by me to the attorneys in January, 1931, when a meeting was held and authority to dissolve the company was

voted; that the delivery of cash and stocks to the majority stockholders of the old company was made at Philadelphia on October 7, 1930 across the table with me present.

That when the capital stock issues were worked out, it was planned to issue 65,000 common shares of the new company of which Atlas subscribed for 32,198; that it was thought 65,000 shares would be necessary to take care of the majority and minority stockholders of the two old companies and the subscription of Atlas; any balance of Peerless-Union stock would belong to Atlas, but it was decided that Atlas' record holdings would be limited to 32,198 shares because of the objections of the sales departments of these companies which departments felt that if Atlas had too dominating a position they would lose good will and a lot of the business of the old companies; so 2500 shares of the balance was issued to me and 2500 shares to Seligman.

Cross Examination

In 1927 I resigned all employment with Atlas Powder Company and retired from any business activity; and thereafter resided in Philadelphia, but frequently saw Mr. Seligman between 1927 and 1930. One day in January, 1930, Mr. Seligman was in Philadelphia and informed me that Mr. Lyon of Atlas Powder Company wanted both Mr. Seligman and myself to come to Wilmington where the offices of Atlas were, and see him. We called on Mr. Lyon in Wilmington in January, 1930 not knowing the purpose intended and he said that they (Atlas Powder Company) desired to work out some plan to take over these powder companies, Union Explosives,

Black Diamond and Peerless Explosives Companies. He was wondering if we could suggest anything to help Atlas work out some constructive plan whereby they could get hold of these companies. He knew that I knew these men intimately and had for many, many years. I knew the majority stockholders of both Peerless and Union intimately for many years but did not know a lot of the others. I knew Mr. Long of Union very well but did not know the others of Union very intimately. I knew Day, Frost and Bashford of Peerless intimately but the other stockholders of Peerless I had only met, and did not know them very well. A few of them lived around Tamaqua and were friends of mine.

Mr. Lyon told me he would like to form a company to take these companies over; that he wanted to get hold of them and he wanted us to consider that and go out and see what offers we could get, to get some line on a basis for a negotiation. The instructions that Mr. Lyon gave me and Mr. Seligman at the first meeting was to keep in mind the general plan of forming a company to take them over and to go and talk with them, to get some figure that would be a basis to negotiate on. Mr. Lyon suggested and told me that he wanted to form a new company and to see if I could not acquire the stock of these companies through exchange of stock for the new company. This was Mr. Lyon's idea and I agreed with it. It was not my idea, or at least I did not say so at first but I knew and he knew that probably was the only way it could be put through. I knew this because I know how these deals are handled with these other companies. They will not sell out. You cannot buy them out unless they are bankrupt; unless you pay them a sum of money

which would be beyond all reason. You must take them in some way through a reorganization and allow them to make money that way and continue in the business. Prior to meeting with Mr. Lyon I had not discussed with any of these stockholders of Peerless or Union whether or not they would be interested in selling their stock for cash. I had heard that other people had made them offers and informally they told me and I knew pretty well how they felt but I had never talked with any of the stockholders because I never had anything to offer them or to suggest. I satisfied myself that they would not sell out for cash because I know these stockholders to be independent men. I have been associated with them a long time and I knew there would be no chance. I knew they had been offered cash by other interests and they would not talk about it even.

The conference with Mr. Lyon lasted probably a couple of hours and the only contract entered into between myself and Mr. Seligman on the one hand, and the Atlas Powder Company on the other hand, at the time of that meeting, was that Mr. Lyon stated that if the deal could be put through he would place us as officers in the new company. The deal to be put through was the plan to acquire these companies under this plan of reorganization that Mr. Lyon was suggesting. There was nothing said at the time about what salary I would draw as such officer. I made no inquiry about the salary because I knew whom I was dealing with. There was no agreement between Mr. Lyon representing the Atlas Powder Company and myself and Mr. Seligman as to the time required to put the deal through. I did not ask Mr. Lyon what my compensation was going

to be as it made no difference to me. I was not doing anything anyway. I was well satisfied if I could become placed in the business again in a good position which would give me something to do, which was what I was after. I was perfectly willing to spend my time on that plan rather than being around doing nothing. If the plan had not gone through, I was not to be compensated. I was perfectly willing to gamble and go out and do this work to get a job if the plan went through.

Nothing was said to Mr. Seligman at the meeting with Mr. Lyon with regard to any compensation. He had a business and he had to take a good deal of time off working on this plan, but, of course, it was right up in his territory which did not make it quite so bad for him as it might have been. I had to go up there and do most of the work. Mr. Seligman did not exact any compensation. He had a going business up there in Tamaqua at that time. He did not care anything about the job. He would do it as a matter of friendship of Atlas and for me. He was given a job because he was an asset to the company in the sales end of this business. What I have related heretofore is all that took place at the meeting with Mr. Lyon. At the conclusion of that meeting when Mr. Seligman and I departed the specific instructions that we had were to see the majority holders and see how they felt about this plan and see what we could do with them. We had no instructions that if the majority holders were not willing to go into the formation of a new company, to see whether or not they would sell their stock outright. That was not considered. I think Atlas would have acquired the business of these corporations without forming a new company if Atlas could have

taken them over for a moderately small sum of money, but I believe that Mr. Lyon was pretty sure that that could not be done so he did not even attempt it. At the time of this meeting, I do not think that Mr. Lyon had seen or talked to any of the stockholders about the possible purchase of their stock in those companies.

The work was divided up between Mr. Seligman and myself but we went together. We first contacted Mr. Frost and Mr. Bashford of the Peerless Company who really were the dominating interests of that company. They were the officers of Peerless and we had a long talk with them. We did not disclose Atlas Powder Company at this time. We told them we had a plan of reorganization of the company that we thought would be very interesting to them. We told them we had backing which we did not disclose and told them we did not care to at that time. We told them we had backing that would provide ample money to reorganize their company and the Union Company and put them into another company, and would provide them with ample working capital so they could expand and so that their people could get their original investment out of it, and we wanted them to tell us on what basis they would talk on going into a thing like that. Mr. Frost and Mr. Bashford said they would be willing to consider any plan that looked as though they would make progress and that they would get out of it what they thought was due them, and we insisted that they tell us their ideas which they would not do. They said that they had to talk to Mr. Day and they had to carefully consider the thing before they would make us any proposition of any kind. That was all that happened that day and we met thereafter later

on. I did not tell them how much cash they would get out of it. I was trying to find out what was involved in the thing; what their ideas were because we had no base to figure on. We did not have any of their statements at that point. This was more or less a feeler to see whether or not they would be favorably inclined to disposing of their stock. After this conversation with Mr. Frost and Mr. Day, I cannot remember just the order in which I saw all these people, but shortly afterwards I saw Mr. J. Edgar Long alone with Mr. Seligman. He was the majority holder of the outstanding stock of Union. He was willing to go into the thing the same as they were. He would not commit himself and he wanted to go over it with his immediate associates so after a lot of talk, that ended that meeting.

The way that we put it up to Mr. Long and Mr. Frost and Mr. Bashford they became interested. We put up a good picture that their business would be improved and that their business would expand a lot faster than if they tried to do it themselves with their very limited capital.

Q. I thought your plan was to get the business of these corporations. How would there be any progress in the business of those corporations if it was ultimately understood that the point you were reaching was for Atlas to get their business?

A. Because they were going along with us. There was never anything else thought of except that—that they would go along with the Company.

Q. Their return was to come from dividends on stock in the new company?

A. That, and whatever they got out of the original plan, of course.

We did not report back to Mr. Lyon at that stage. We waited for the replies of these people. We did not bother any minority stockholders at that stage. We figured that if we could not sell the idea to the majority we might as well quit so a few weeks later we met with Mr. Frost and Mr. Bashford again and they named a definite figure, and they wanted to know definitely what we had in mind.

Q. What do you mean by "a definite figure" —in dollars and cents?

A. No; there was not any dollars and cents involved. They named a figure at which they would turn over their majority holdings, and then they named a percentage interest, as I remember, which they demanded to be given them from the new company, and they demanded certain salary stipulations, and so forth.

Q. Oh, did you divulge to them that they would also be officers in the new company?

A. We told them they would be employed. We did not say as what, and that was very necessary in this deal, because these men would not come in under the plan on any other basis, I do not believe.

We had no authority from Atlas Powder Company at that time to hand out jobs to any of these people. Our only authority was to find out what had to be done to make the thing a success. It was a counter-proposal from them that they would have to be taken care of in the way of jobs, but I expected that, and then Mr. Long came along the same way. He

wanted so much cash interest in the company and to be retained in the company. We did not divulge where the money was to come from or the connection with the Atlas Powder Company. We divulged the fact that we were going to be officers in the new company. We represented that we were representing an interest to do this job, and we were going through with it and stay with it. The majority stockholders did not inquire how much salary we were to get as officers. They were not interested in that. All of these men were friends of mine. I obtained tentative proposals from both parties which were pretty high. I do not know the details of them. Mr. Seligman and I took them to Mr. Lyon and that gave us a base for considering the proposal. During all of this time I never divulged that we were representing the Atlas Powder Company. We kept this quiet until July. We told them frankly we were representing a strong interest with plenty of money and we were not at liberty to divulge it. We told them it was all right and they had enough confidence in us to let it go through at that. The fact that it was not divulged that the Atlas people were interested was because if it became known in the trade that Atlas Powder was out trying to buy out these small companies, and that is the word that would go around; it is very likely that some competitive interest would try to stop it by getting hold of a stockholder to stop it, or buying up stock to hold out, or something of that kind, and it would also probably make it much more difficult to bring in the minority stock interests, if it became generally known that such a large corporation was interested. I can't remember specifically what the next step was except we carried on negotiations back and

forth a number of times until we finally got down to the plan as set forth in these papers, (Contracts of Oct. 7) which the majority stockholders accepted orally.

Lawyers and accountants first came into the meetings about the first of June after we had made the deal with the majority holders. We told the majority holders in July that the amounts they wanted and the protection they wanted for the stockholders etc. were satisfactory to us and our principals and the majority holders said "all right then if the majority can now be brought in we will go through with the deal". There had been no discussion about the stockholders' liability for Federal income tax up to that time and we only heard the matter discussed when the thing was finally closed. That might have gone on without our knowing it. The lawyers might have done that but I do not know anything about it. I first heard about it when I heard the lawyers discuss it in the last couple of days of the proposition. I was around their offices a lot then. They were discussing it and it was in one of the contracts that if there was a tax Atlas would have to pay it. There was an agreement reached between the majority stockholders of Peerless and Mr. Seligman and myself about the first of July and it was after July that we tried to get in touch with the minority stockholders. That was one of the stipulations in the plan, that we bring in practically all of the minority stock. So we immediately worked out a plan which we thought was fair and submitted it to the minority stockholders. This did not occur until after we had agreed with the majority. We approached the minority group, sending out a letter to every one setting forth the offer for their pre-

ferred and common stocks as set forth in the plan. We offered to buy their preferred stock for cash at what they paid for it, par, and we offered to exchange their common and we offered to compensate them for back dividends in the form of common stock of the new company. That was in the offer and we asked them for options on their stock. I am not talking about the 1544 preferred group and the 600 odd group. They are the ones that never did come in under this plan. I am talking about the entire stockholders of the company outside of these four. In the Peerless Company, I am talking about the difference between 16,128 holders of preferred stock and the 8500 group. I reached an agreement with Mr. Long in July, about a couple of weeks after the agreement with the majority group of Peerless. It was necessary to wait from July to October before the contracts were written up because it proved to be a tremendous job and took an awful lot of time to get these 400 stockholders to turn in their stock. I had to travel continuously selling the idea. We had to do mostly by personal solicitation and there were so many of them to see. The first thing that I knew about the stock of the company being issued to me was when I received the certificate. I did not know anything about it until it was given to me. I think that was given to me on the 8th but I cannot recall absolutely. It was just handed to me by one of the Atlas officers. It may have been Mr. Lyon but there was so much confusion I have forgotten it. I had never heard it mentioned that I was to get any stock but it was handed to me and I knew nothing about it. In handing it to me Mr. Lyon or one of the officers who gave it to me told me it was being given to me and he said it was being given to

Mr. Seligman too, in order to reduce the amount of Atlas holdings in this company for sales reasons and they expected us to hold it to be used for the interest of Atlas in any way that they cared us to use it, and we were perfectly willing to do it.

The certificate was not made out in the name of the Atlas Powder Company, but it was made out to me as though I owned it. I did not assign it and give it back to Mr. Lyon but I kept it right through until the Peerless-Union was consolidated with Atlas which was about March 1932, I think. No dividends were paid on this stock during the interim and when Mr. Lyon gave it to me he did not say anything to me with respect to future dividends on the stock. Mr. Lyon did not say anything about dividends because he knew that I knew there was no possibility of dividends on it for some time, anyway. I did not know this when the certificate was handed to me, only in a general way. Not a word was said to me or any mention made to me about what I was to do with the dividends if dividends were declared. Mr. Lyon did not ask me to sign the certificate in blank, he just gave it to me and told me why it was given to me and there was nothing more said about it. I told him I would hold it accordingly, and that was the end of it.

When Peerless-Union and Atlas consolidated in 1932, I was issued shares of Atlas in exchange for the Peerless-Union stock. The Atlas stock which I received in the 1932 exchange I sold and I got the proceeds resulting from the sale.

Mr. Lyon told me he was giving Mr. Seligman a certificate for 2500 shares. Mr. Seligman got a position with the new company up in Tamaqua. He was appointed sales manager for that District—

something he could carry on and his own business, too. He got a salary which was fixed monthly and I also got a salary so much a month. I was an officer of the new company, Peerless-Union, and Mr. Lyon fixed my salary and all salaries of the Peerless-Union. Mr. Lyon suggested all the salaries to which all the officers agreed, and Mr. Seligman and I fixed them the way that Mr. Lyon had suggested.

Redirect Examination

Q. You stated a moment ago that when the stock you had in Peerless-Union Company was exchanged for Atlas stock, you thereafter sold the stock or part of it and received personally the consideration therefor. Were you permitted to hold the Atlas stock and receive the consideration as a result of compensation or bonus for services rendered before or after October 7, 1930?

A. Afterwards. They told us that now that the thing was wound up and Atlas for economic reasons had taken over the Peerless-Union they would let us keep that stock, because we had earned it.

I understood that the 2500 shares were issued to Seligman and me because of sales reasons. It has been a matter of experience in taking over companies that you are very apt to lose the good will and a lot of their business if one of the large, dominating companies take it over in a way that the trade people feel that they are dominating that company 100 per cent. So in order to offset that feeling which is always present, Atlas felt it advisable

to reduce their holdings to a reasonable extent, so they only had a bare majority.

Atlas did not want to have it a matter of record that they held 57 or 58 per cent of the Peerless-Union stock. I do not mean to imply by my testimony that Atlas in any way divorced itself of real ownership of the 5000 shares, as I know they did not. It was about the first of March 1932, after the Peerless-Union stockholders had voted to accept the Atlas offer that I was advised that the stock and its emoluments or proceeds were mine to keep for myself; they told us that they were pleased with the way we had handled the Peerless-Union and they would be glad to let us have that stock to keep. Mr. Lyon told me that. I considered this a release from my previous agreement to hold the stock for Atlas' disposition at any time. Mr. Lyon said he was very well satisfied with the way we had handled the Peerless-Union Company and wound it up in accordance with Atlas' offer, and so forth.

In all my negotiations with the stockholders of Peerless and Union Companies, the plans considered always provided for a continuity of interests in the new company; the stockholders wouldn't consider anything else. I wanted these stockholders to continue with the new company as they were valuable to us, Atlas wanted to secure the business of those companies.

When I first approached Bashford, Frost and Day, we had a basic plan in mind to form a new company; we never solicited a cash offer for all their holdings and we never considered doing so and never suggested it, and we did not treat this as a purchase of their holdings.

* * * * *

Q. They were not interested, when this plan was put up to them, that they should have the same continuity in Atlas that they had had in their own corporations?

A. You mean in 1932?

Q. No; in 1930.

A. Well, when the agreement was drawn with the majority stockholders they did not know Atlas was in the picture or when we originally got together on it.

Q. So there was nothing about a continuity of interest in going into the Atlas Company?

A. Not at that moment.

(Mr. Moyle). I may say I asked the question with respect to Peerless-Union and not as to Atlas.

Between the period from 1930 to 1932, I kept the certificate of 2500 shares of Peerless-Union in my safety-box and not until 1932 did I make any assignment of it. The certificate which was issued to Seligman, I do not know where he kept it.

In connection with the reorganization in 1932 when Peerless-Union sold to Atlas, Atlas made the offer to all the stockholders of Peerless-Union. I received the offer and attended the stockholder's meeting and director's meeting and voted in favor of accepting Atlas' offer. At that meeting I voted 2500 shares direct and not by proxy. I voted the 2500 shares at the previous meeting of stockholders in 1931. As I remember, Mr. Seligman was present in 1931 at the stockholder's meeting and he voted the stock.

At the meeting of October 7th in Philadelphia, I was present, attorneys representing Atlas and Peerless-Union were present; there were some auditors there, Mr. Seligman was present and he was representing himself as one of the contracting parties. Mr. Frost was there in person, as was Long, Day and Bashford, and some others that I have forgotten. All the contracts which are attached to the Stipulation in this case were signed at a continuous series of meetings held on that date when the stock certificates were exchanged and the majority holders received in exchange therefor the consideration provided in the contracts. Checks and not cash were passed. These checks were issued by Peerless-Union; Atlas had taken Peerless-Union stock and given that Company cash of over $900,000 and securities and then Peerless-Union in turn paid that out to these stockholders. The cashier of the Tamaqua Bank was present at the meeting to receive the $900,000 odd and the securities from Peerless-Union which Atlas had previously at the same meeting handed to Peerless-Union. He took the stock that the stockholders turned in and received the money to distribute then and there, and went right back to Tamaqua.

Q. So this was a deposit of the nine hundred odd thousand dollars in the name of Peerless-Union, and Peerless-Union had individual checks drawn to the stockholders set forth in these agreements for the amount of cash they were to receive drawn against that deposit.

A. I think the bank only got about $600,000 —$300,000 was working capital.

Q. That is right. There was $300,000 retained as working capital, but it was all, like-

wise, deposited in the bank down there, was it not, or were there two checks, one for some $600,000 and the other

A. Yes; they were separated * * * .

There never was at any time any written contract between the Atlas Powder Company and any of the stockholders of the Union or Peerless, except Exhibit "F" attached to the stipulation is a contract made between Edward R. Day, party of the first part, Peerless-Union Explosives Corporation, party of the second part, and Atlas Powder Company, signed by me and is just the tax contract. I had forgotten the details of those tax contracts because I did not handle them. In connection with the reorganization plan, Atlas acted through us. I know of no contracts which Atlas signed in connection with it; I had overlooked those tax contracts which came afterwards.

Redirect Examination

The only two meetings of the stockholders of Peerless-Union were those held in 1931 and 1932. At those meetings I voted the 2500 shares. The stock issued in the name of Atlas was voted by proxy. There were three names mentioned on the proxy. I have forgotten just who the three were but I know either Seligman or I were on the proxy.

When I stated I was representing myself at the meeting of October 7th as one of the signatures of the contracts, I was still representing Atlas at that time. During all the negotiations with the stockholders of Peerless and Union up to the early part of July 1930, I indicated I was working for an undis-

closed principal who expected to finance this reorganization plan. On October 7th I think all parties to the plan knew of Atlas' identity and there was no attempt to cover it up at that period.

Recross Examination

From July 1930 to October 7th, the majority stockholders of Peerless and Union companies knew the undisclosed principal was the Atlas Powder Company. After they agreed, we told them.

* * * * *

MR. MOYLE:

If your Honor please, the petitioner desires to amend his petition in this case to conform to the stipulation and to the proof that has been put in evidence, first, by changing the figure 2,521 shares of Peerless Explosives stock in paragraph 5 (a) (1) thereof to 2,534.38 shares of Peerless Explosives Company stock.

Second, by changing the words "Peerless Explosives Company" at the beginning of paragraph 5 (e) (4) to "Peerless-Union Explosives Corporation".

This was purely an error of the stenographer, if your Honor please.

Third, by striking out from the first line of paragraph 5 (e) (5) the word "directly" and substituting therefor the following: "through the First National Bank of Tamaqua, Pa., and/or Peerless-Union Explosives Corporation".

Fourth, by the following change in paragraph (e) (9) after the words "common stock", "At-

las Company", to substitute for the figures 32,198 and the percentage 54.34 the following, "32,198 issued in the name of Atlas Powder Company and 5,000 issued in certificates of 2500 shares each to Messrs. Seligman and Fletcher, as nominees for Atlas Powder Company".

The percentage to be set opposite thereto should be 62.77 plus".

* * * * * *

MR. GIBBS:

* * * I have no objection to the amendment. I will simply deny * * *.

THE MEMBER:

Very well. The motion to amend the petition is granted. * * *

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals and the same is approved by the undersigned, Herman Oliphant, General Counsel for the Department of the Treasury, attorney for the Commissioner of Internal Revenue.

(Signed) HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned as attorney for the respondent on review.

WALTER G. MOYLE,
Attorney for Respondent on Review.

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this 12th day of May, 1936.

CHARLES P. SMITH,
Member, United States
Board of Tax Appeals.

PRAECIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Third Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Third Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board.
   (A) Petition, including annexed copy of deficiency letter.
   (B) Answer.

3. The stipulation of facts together with all ex-

hibits which were attached and filed with the stipulation of facts.

4. Opinion and decision of the Board.

5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

6. Statement of the oral testimony as settled and allowed.

7. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record. (Not included in record.)

8. This praecipe.

(Signed) HERMAN OLIPHANT,
General Counsel for the Department of the Treasury.

Service of a copy of the within praecipe is hereby admitted this 20th day of April, 1936.

WALTER G. MOYLE,
Attorney for Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 179, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 20th day of May, 1936.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

(SEAL)

A STATEMENT OF THE RIGHTS, PRIVILEGES, PREFERENCES AND VOTING POWERS OF THE PREFERRED AND COMMON STOCK OF PEERLESS-UNION EXPLOSIVES CORPORATION IS AS FOLLOWS:

The terms, conditions and provisions of the 6% Cumulative Preferred Stock and the Common Stock of the Corporation as set forth in Articles FOURTH, NINTH and TENTH of the Certificate of Incorporation are as follows:

FOURTH: The total authorized capital stock of this Corporation is Fifty Thousand (50,000) shares of preferred stock of the par value of One Hundred Dollars ($100) per share, amounting in the aggregate to Five Million Dollars ($5,000,000), and One Hundred Thousand (100,000) shares of common stock without nominal or par value.

The holders of all shares of preferred stock shall be entitled to receive or have set aside out of the net profits or out of the net assets in excess of the capital of the corporation as determined by law, applicable to dividends, dividends at the rate of six per centum (6%) per annum and no more, payable quarterly on dates to be determined by the board of directors.

Dividends on the preferred stock shall be cumulative and shall be payable before any dividend on the common stock shall be paid or set apart. The holders of the preferred stock shall not be entitled to participate any further, by way of dividends, in the surplus or net earnings of the company.

Whenever accumulated dividends on the preferred stock for all previous years and quarterly periods and for the current quarterly period shall have been paid or set aside, all remaining profits or net assets in excess of the capital of the corporation as determined by law may be applicable as dividends on the common stock, if, as and when declared by the board of directors.

The preferred stock shall be redeemable as a whole or in part at any time upon ninety days' notice at the option of the corporation, to be exercised by resolution of its board of directors, upon payment to the holders of said stock of the sum of $100.00 per share, together with all unpaid and accumulated dividends thereon to the date of such redemption. Such notice of redemption shall be given not less than ninety days prior to the date fixed for such redemption by publication in one newspaper of general circulation in the City of Wilmington, Delaware, and one in the City of Philadelphia, Pennsylvania, and by mail to the owners of all such shares to be redeemed, as registered on the books of the corporation, to the addresses of such owners as the same appear on the books of the corporation. In the event of redemption of less than all of the shares of said stock issued and outstanding, the shares to be redeemed shall be determined by lot, and such notice shall state the names of the holders of the shares redeemed and the number of shares to be redeemed held by such persons, respectively.

In the event of any liquidation, dissolution or distribution of assets, whether voluntary or involuntary, the holders of the preferred stock shall be entitled to receive out of the assets of the corporation remaining after the payment of debts, before any payment or distribution is made out of the said assets to the holders of shares of common stock, the sum of One Hundred Dollars ($100) per share and all unpaid and accumulated dividends thereon apportioned to the date of payment. The holders of the shares of preferred stock shall not be entitled to participate any further in said assets than as herein provided. After said amount is paid to the holders of the preferred stock, the remaining assets shall be divided and paid to the holders of the common shares equally and pro rata according to their respective shares.

Except as hereinafter provided in Articles NINTH and TENTH, the holders of the preferred stock as such shall have no right to vote at any meeting of the corporation, except only when and in the event the corporation shall have been, for the continuous period of two years, in default in the payment of dividends thereon or any part thereof, or in the event the net earnings of the corporation for each of the two consecutive calendar years, respectively, immediately preceding any such meeting, shall have, for each of the said years, fallen below the amount necessary to pay the dividends accruing on such stock, in either of which events the holders of the preferred stock shall have equal voting powers with the holders of the common stock, that is to say, the holders of the preferred stock shall be entitled to one vote for each share of such preferred stock so held by them.

At all elections of directors each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock, both common and preferred, entitled to vote thereat multiplied by the number of directors to be elected and he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit.

The holders of the shares of either class of the capital stock of the corporation at the time of any issue of the stock of such class, shall have the prior right to subscribe to such issue pro rata to their respective holdings in such class provided the corporation may at any time issue and deliver any part of its capital stock and any increase thereof in exchange or payment for property; provided, however, that prior to any such issuance, written consent of the holders of a majority of the total number of shares of stock of both classes shall have been obtained thereto.

NINTH: Pursuant to the affirmative vote of the holders of at least a majority of the total number of shares of stock of both classes issued and outstanding, given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of the holders of at least a majority of the total number of shares of stock of both classes issued and outstanding, the board of directors shall have power and authority at any meeting (1) to authorize the execution of mortgages and liens upon the real and personal property of this corporation; (2) to create funded indebtedness maturing more than one year from date; and (3) to authorize the sale, lease or exchange of all of the property and assets of this corporation including its good will and its corporate franchises, upon such terms and conditions as the board of directors may deem expedient and for the best interests of the corporation.

TENTH: This corporation reserves the right to amend, alter, change or repeal any provision contained in this certificate of incorporation, in the manner now or hereafter prescribed by statute, pursuant to the affirmative vote of the holders of at least a majority of each class of stock issued and outstanding, given at a stockholders' meeting duly called for that purpose, and all rights conferred upon stockholders herein are granted subject to this reservation.

FOR VALUE RECEIVED, _____ *hereby sell, assign and transfer unto*

_____

_____ *Shares*

of the stock represented by the within Certificate and do hereby irrevocably constitute and appoint

_____ *Attorney*

to transfer the said stock on the books of the within named Corporation with full power of substitution in the premises.

Dated _____ *19*

In presence of:

_____

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the Certificate, in every particular, without alteration or enlargement, or any change whatever.

EXHIBIT "Q"

...UNDER THE LAWS OF THE STATE OF DELAWARE.

_____ Shares

...UNION EXPLOSIVES CORPORATION

...PAR VALUE $100.00 EACH FULL PAID AND NON-ASSESSABLE

...% CUMULATIVE PREFERRED STOCK

_____ is the owner of

_____ Shares

...UNION EXPLOSIVES CORPORATION, full paid and non-assessable,

...by ... and ...torney, ...on surrender of this certificate

...CUMULATIVE ... privileges, preferences and voting powers, and ... upon, and upon the terms and conditions set forth in full on the ... properly presented by accepting this certifi- ... this certificate and on the back hereof.

PREFERRED

...Corporation has caused its corporate ... this certificate to be executed in its name and behalf by its duly authorized

_____ day of _____ A. D. 19____.

PEERLESS-UNION EXPLOSIVES CORPORATION

_____ TREASURER. _____ PRESIDENT.

SECURITY BANK NOTE CO PHILADELPHIA

Ex. "T"

Peerless-Union Explosives Corporation

Journal Entry Voucher

Date October 6, 1930 No. [illegible]

	Debit	✓	Credit	✓	Folio
Assets - Various - per schedule	$1,216,702.47	✓			
Land, Buildings, Machinery & Equipment	536,607.27	✓			
Goodwill	906,586.92	✓			
Liabilities & Accrued Charges - per schedule			$ 881,34[illegible].66	✓	
Notes Payable - Peerless Explosives Co.			1,036,800.00	✓	
Notes Payable - Union Explosives Co.			871,750.00	✓	
In re: purchase of assets of Peerless Explosives Co. and Union Explosives Co.					

Prepared and approved by
Barrow, Wade, Guthrie & Co.
Examined and found correct

Approved

The Peerless-Union Explosives Corp., organized under the laws of Delaware, September 22, 1930

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Peerless-Union Explosives Corporation

Journal Entry Voucher

Date October 6, 1930

No. 002

	Debit	✓	Credit	✓	Folio
Cash	$ 959,558.25	✓			
Investments - Atlas Powder Co. Stock	1,212,641.75	✓			
Preferred Stock			$2,172,200.00	✓	

In re. issuance of 21,722 shares of Preferred Stock of Peerless-Union Explosives Corp. in exchange for $959,558.25 in cash and 6,318 shares of Preferred Stock and 8,712½ shares of Common Stock of Atlas Powder Co.

Cash

Common Stock - No Par Value

In re. [illegible] shares of Common Stock

Barrow, Wade, Guthrie & Co.

Form 7 [illegible]

Peerless-Union Explosives Corporation

Journal Entry Voucher

Date October 6, 1930 No. [illegible]

	Debit ✓	Credit ✓	Folio
Investments - Peerless, Black Diamond & Union	$1,844,791.75		
Cash		$ 632,150.00	
Investments - Atlas (6,318 Pfd. & 8,712½ Com.)		1,212,641.75	
Common Stock - 32,145.79 shares		-	

In re. acquiring the undernoted:

Peerless Explosives Co.

16,128 shs. Preferred Stock ($25.Par)

14,288 " Common Stock (No Par)

Black Diamond Powder Co.

1,584 shs. Common Stock

Union Explosives Co.

3,367½ shs. Preferred Stock ($100.Par)

4,044 " Common Stock (No Par)

Barrow, Wade, Guthrie & Co.

The Peerless-Union Explosives Co., organized under the laws of Delaware, September 22, 1930.

Form 7 500 10-30

Peerless-Union Explosives Corporation

Journal Entry Voucher

112

Date October 6, 1930 No. [illegible]

	Debit	✓	Credit	✓	Folio
Notes Payable - Union	$ 35,408.25	✓			✓
Suspension (J. Edgar Long)			$ 35,408.25	✓	

Debit balance of J. Edgar Long deducted in settlement October 7, 1930

Goodwill	3,250.00				
Investments-Peerless, Black Diamond & Union			3,250.00		

Excess investments cost over purchase price of assets of Peerless, Black Diamond & Union

Form 7 500 10-30

Peerless-Union Explosives Corporation

Journal Entry Voucher

Date October 24, 1930 No. 2005

	Debit	✓	Credit	✓	Folio
Cash	$ 7,000.00	✓			
Investments - Peerless, Black Diamond & Union			$ 7,000.00	✓	

Refund in re. cost of stock acquired

Prepared and checked by
Barrow, Wade, Guthrie & Co.
Examined and found correct for entry

Approved

The Peerless-Union Explosives Corp., organized under the laws of Delaware, September 22, 1930.

Form 1 883 10-30

Peerless-Union Explosives Corporation

Journal Entry Voucher

114

Date NOVEMBER 30, 1930 No. 11060

	Debit	✓	Credit	✓	Folio
NOTES PAYABLE UNION EXPLOSIVES CO.,	836,341.75 ✓				
INVESTMENTS- PEERLESS EXPLOSIVES CO., BLACK DIAMOND POWDER CO., AND UNION EXPLOSIVES COMPANY			836,341.75 ✓		

TO CANCEL NOTES PAYABLE OF UNION EXPLOSIVES COMPANY ON ACCOUNT OF DISOLUTION OF THAT COMPANY ON NOVEMBER 25, 1930.

Prepared and checked by

Examined and found correct for entry

Approved C. L. Pulleton

Form 7 500 10-30

Peerless-Union Explosives Corporation

Journal Entry Voucher

Date DECEMBER 31, 1930 No. 12074

	Debit	✓	Credit	✓	Folio
NOTES PAYABLE - PEERLESS EXPLOSIVES CO.	$1,036,800.00				
INVESTMENTS, PEERLESS, BLACK DIAMOND, AND UNION EXPLOSIVES COMPANY			$1,036,800.00		

CANCELLING NOTES PAYABLE TO PEERLESS EXPLOSIVES COMPANY. THE ENTIRE OUTSTANDING CAPITAL STOCK OF PEERLESS EXPLOSIVES CO. HAVING BEEN ACQUIRED BY PEERLESS-UNION EXPLOSIVES CORP. THE PEERLESS EXPLOSIVES CO. AND BLACK DIAMOND POWDER CO. HAVE BEEN DISSOLVED.

Prepared and checked by

Examined and found correct for entry

Approved C. B. Cullerton

Form 7 500 10-30

Peerless-Union Explosives Corporation

Journal Entry Voucher

116

Date DECEMBER 31, 1930 No. 12075

	Debit	✓	Credit	✓	Folio
INVESTMENTS - PEERLESS, BLACK DIAMOND AND UNION EXPLOSIVES COMPANY	$ 38,600.00	✓			
FIRST NATIONAL BANK, TAMAQUA, PA.			$ 38,600.00	✓	

TO CLOSE OUT ABOVE AMOUNT REPRESENTING DISBURSEMENT OF FUNDS ADVANCED TO FIRST NATIONAL BANK IN CONNECTION WITH PEERLESS EXPLOSIVES COMPANY STOCK. ALL STOCK HAVING BEEN, ACQUIRED AS OF DEC. 31, 1930

Prepared and checked by

Examined and found correct for entry

Approved C. E. Pulleston

NOT INVESTIGATED FIELD AUDIT

Form 1040
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

(Auditor's Stamp)

CLOSED
Date 11/12/31
A. Schultz
Unit 8
12/4/31

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN $5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1930

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1931

PRINT NAME AND ADDRESS PLAINLY BELOW

RAYMOND I. BASHFORD
(Name)

260 South Broad Street
(Street and number, or rural route)

Philadelphia (Post office) Philadelphia (County) Pa. (State)

Occupation Manufacturer

Net Wage

File Code 108

Serial Number 300859

District Penna

(Cashier's Stamp)
RECEIVED PAYMENT
BY CHECK
MAR 11 1931
J. D. MAC LAUGHLIN
PHILA. DIST. COLLECTOR INT. REV.

Cash Check P.O. Cert. of Ind.
First Payment
$

1. Are you a citizen or resident of the United States? Yes
2. If you filed a return for 1929, to what Collector's office was it sent? Scranton, Pa.
3. Is this a joint return of husband and wife? Yes
4. State name of husband or wife if a separate return was made and the Collector's office where it was sent -
5. Were you married and living with husband or wife on the last day of your taxable year? Yes
6. If not, were you on the last day of your taxable year supporting in your household one or more persons closely related to you? -
7. If your status in respect to questions 5 and 6 changed during the year, state date and nature of change No
8. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support were receiving their chief support from you on the last day of your taxable year? 4

1930 33 94

Item and Instruction No.	INCOME	Amount received	Expenses paid (Explain in Schedule F)				
1.	Salaries, Wages, Commissions, etc. (State name and address of employer).						
	Pearless Explosives Co. Philadelphia, Pa.		$	$ 7	650	00	✓
	Black Diamond Powder Co. " "			1	350	00	✓
	Peerless-Union Explosives Corp. Phila., Pa.			3	000	00	✓
2.	Income from Business or Profession. (From Schedule A)						
3.	Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)				8	22	
4.	Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source						
5.	Income from Partnerships. (State name and address)						
6.	Income from Fiduciaries. (State name and address)						
7.	Rents and Royalties. (From Schedule B)						
8.	Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			25	693	13	
9.	Taxable Interest on Liberty Bonds, etc. (From Schedule E)						
10.	Dividends on Stock of Domestic Corporations			1	452	89	✓
11.	Other Income (including dividends on stock of foreign corporations). (State nature of income)						
	(a)						
	(b)						
12.	TOTAL INCOME IN ITEMS 1 TO 11					$ 39 154	24
	DEDUCTIONS						
13.	Interest Paid			$	147	12	
14.	Taxes Paid. (Explain in Schedule F)				126	83	✓
15.	Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)						
16.	Bad Debts. (Explain in Schedule F)						
17.	Contributions. (Explain in Schedule F)				64	00	
18.	Other Deductions Authorized by Law. (Explain in Schedule F)						
19.	TOTAL DEDUCTIONS IN ITEMS 13 TO 18					$ 357	95
20.	NET INCOME (Item 12 minus Item 19)					$ 38 816	29

C88 B3 3/1/33

36 1

18.	Other Deductions Authorized by Law. (Explain in Schedule F)				
19.	Total Deductions in Items 13 to 18			$ 557	25
20.	Net Income (Item 12 minus Item 19)			$ 38 816	29

EARNED INCOME CREDIT

21.	Earned Income (not over $30,000)		$ 12000	00
22.	Less Personal Exemption and Credit for Dependents		5100	00
23.	Balance (Item 21 minus 22)		$ 6900	00
24.	Amount taxable at 1½% (not over $4,000)		$ 4000	00
25.	Amount taxable at 3% (not over $4,000)		2900	00
26.	Amount taxable at 5% (balance over $8,000 of Item 23)			
27.	Normal Tax (1½% of Item 24)		$ 60	00
28.	Normal Tax (3% of Item 25)		87	00
29.	Normal Tax (5% of Item 26)			
30.	Surtax on Item 21		20	00
31.	Tax on Earned Net Income (total of Items 27 to 30)		$ 167	00
32.	Credit of 25% of Tax (not over 25% of Items 30, 44, 45, and 46)		$ 41	75

COMPUTATION OF TAX (See Instruction 22)

33.	Net Income (Item 20 above)			$ 38816	29
	LESS:				
34.	Liberty Bond Interest (Item 9)	$			
35.	Dividends (Item 10)	1452	89		
36.	Credit for Dependents	1600	00		
37.	Personal Exemption	3500	00		
38.	Total of Items 34 to 37			6552	89
39.	Balance (Item 33 minus 38)			$ 32263	40
40.	Amount taxable at 1½% (not over $4,000)			4000	00
41.	Balance (Item 39 minus 40)			$ 28263	40
42.	Amount taxable at 3% (not over $4,000)			4000	00
43.	Amount taxable at 5% (Item 41 minus 42)			$ 24263	40

44.	Normal Tax (1½% of Item 40)	$	60	00
45.	Normal Tax (3% of Item 42)		120	00
46.	Normal Tax (5% of Item 43)		1215	17
47.	Surtax on Item 20 (see Instruction 23)		1681	68
48.	Tax on Net Income (total of Items 44 to 47)	$	3074	85
49.	Tax on Capital Gain or Loss (12½% of Col. 8, Sched. D)			
50.	Total of or difference between Items 48 and 49	$	3074	85
51.	Less Credit of 25% of Tax on Earned Income (Item 32)		41	75
52.	Total Tax (Item 50 minus 51)	$	3033	10
53.	Less Income Tax Paid at Source			
54.	Income Tax paid to a foreign country or U. S. possession			
55.	Balance of Tax (Item 52 minus Items 53 and 54)	$	3033	10

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

(If return is made by agent, the reason therefor must be stated on this line)

Sworn to and subscribed before me this 9 day of March, 1931.

Raymond I Bassford
(Signature of individual or agent)

NOTARIAL SEAL

Harry Rosenblum Notary Public
(Signature of officer administering oath) My Commission Expires 3/30/33

(Address of agent)

An amended return must be marked "Amended" at top of return. Checks and drafts will be accepted only if payable at par.

SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION (See Instruction 2)

1. Total receipts from business or profession (state kind of business) _____ $ _____

Cost of Goods Sold

2. Labor _____ $ _____
3. Material and supplies _____
4. Merchandise bought for sale _____
5. Other costs (itemize below or on separate sheet) _____
6. Plus inventory at beginning of year _____
7. TOTAL (Lines 2 to 6) _____ $ _____
8. Less inventory at end of year _____
9. NET COST OF GOODS SOLD (Line 7 minus Line 8) _____ $ _____

Enter "C," or "C or M," on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

OTHER BUSINESS DEDUCTIONS

10. Salaries not included as "Labor," in Line 2. (Do not deduct compensation for your services) $ _____
11. Interest on business indebtedness to others _____
12. Taxes on business and business property _____
13. Losses (explain in table at foot of page) _____
14. Bad debts arising from sales or services _____
15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page) _____
16. Rent, repairs, and other expenses (itemized below or on separate sheet) _____
17. TOTAL (Lines 10 to 16) _____ $ _____
18. TOTAL DEDUCTIONS (Line 9 plus Line 17) _____ $ _____
19. NET PROFIT (Line 1 minus Line 18) (Enter as Item 2) _____ $ _____

Explanation of deductions claimed on Lines 5 and 16 _____

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

1. KIND OF PROPERTY	2. AMOUNT RECEIVED	3. COST OR VALUE AS OF MARCH 1, 1913, WHICHEVER GREATER	4. DEPRECIATION (Explain in table at foot of page)	5. REPAIRS	6. OTHER EXPENSES (Itemize below)	7. NET PROFIT (Enter as Item 7)
	$	$	$	$	$	$
		NONE				

Explanation of deductions claimed in Column 6 _____

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

1. KIND OF PROPERTY	2. DATE ACQUIRED	3. AMOUNT REALIZED	4. DEPRECIATION ALLOWABLE SINCE ACQUISITION	5. COST OR VALUE AS OF MARCH 1, 1913, WHICHEVER GREATER	6. SUBSEQUENT IMPROVEMENTS	7. NET PROFIT (Enter as Item 8)
		$	$	$	$	$
	SEE SEPARATE SCHEDULE					

State how property was acquired _____

SCHEDULE [illegible]—TAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 8a)

1. KIND OF	2. DATE ACQUIRED	3. DATE SOLD	4. AMOUNT REALIZED	5. DEPRECIATION ALLOWABLE SINCE ACQUISITION	6. COST OR VALUE AS OF MARCH 1, 1913, WHICHEVER GREATER	7. SUBSEQUENT IMPROVEMENTS, AND CAPITAL DEDUCTIONS	8. NET GAIN OR LOSS (Enter 12½% as Item 49)
	Mo. Day Year	Mo. Day Year	$	$	$	$	$

was acquired _____

SCHEDULE [illegible]—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

[illegible] OR SECURITIES	2. INTEREST RECEIVED OR ACCRUED	3. AMOUNT OWNED	4. PRINCIPAL AMOUNT EXEMPT FROM TAXATION	5. AMOUNT OWNED IN EXCESS OF EXEMPTION	6. INTEREST ON AMOUNT IN EXCESS OF EXEMPTION (Enter as Item 9)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia	$	$	All	XXXXXX	XXXXXX
(b) Securities issued under Federal Farm Loan Act, Treasury Bills, and Certificates of Indebtedness issued after June 17, 1929			All	XXXXXX	XXXXXX
(c) Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. possessions			All	XXXXXX	XXXXXX
(d) Liberty 4% and 4¼% Bonds, Certificates of Indebtedness issued before June 18, 1929, Treasury Bonds and Savings Certificates			$5,000	$	$
			None		
(e) Treasury Notes					

before June 15, 1929, Treasury Bonds and Savings Certificates					$5,000	$		$
(c) Treasury Notes					None			

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

Contributions:

Wilkes Barre Y.M.C.A.	$10.00
Wyoming Valley Community Fund	25.00
" " Tubercular Society	1.00
Elks Charity Fund	1.00
American Legion	2.00
Mayor's Relief Fund, Phila.	10.00
Church	15.00
	$64.00

Taxes:

Personal Property, Penna.	$ 16.03
Penna. Auto Taxes	26.80
Gasoline Tax, Penna.	84.00
	$126.83

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost or Value as of March 1, 1913, Whichever Greater (Exclusive of Land)	Amount of Depreciation Charged Off	
					6. Previous years	7. This year
				$	$	$

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 15

1. Kind of Property	2. Date Acquired	3. Cost or Value as of March 1, 1913, Whichever Greater	4. Subsequent Improvements	5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage Value	7. Deductible Loss
		$	$	$	$	$

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 6156—October Term, 1936

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RAYMOND I. BASHFORD, RESPONDENT

Appeal from the Board of Tax Appeals

And now, to-wit: this 10th day of November A. D. 1936, it is ordered that Hon. Albert B. Maris, District Judge for the Eastern District of Pennsylvania, is hereby assigned to sit in above case in order to make a full court.

JOSEPH BUFFINGTON,
Circuit Judge.

(Endorsements:) Order Assigning Hon. Albert B. Maris for Argument. Received & Filed Nov. 10, 1936. Wm. P. Rowland, Clerk.

United States Circuit Court of Appeals for the Third Circuit

No. 6156—October Term, 1936

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RAYMOND I. BASHFORD, RESPONDENT

And afterwards, to wit, the 10th day of November, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington and Honorable J. Whitaker Thompson, Circuit Judges, and Honorable Albert B. Maris, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 22d day of January, 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

United States Circuit Court of Appeals for the Third Circuit

No. 6156—October Term, 1936

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RAYMOND I. BASHFORD, RESPONDENT

On Petition for Review of Decision of the United States Board of Tax Appeals

Opinion

(Filed January 22, 1937)

Before BUFFINGTON and THOMPSON, Circuit Judges, and MARIS, District Judge

MARIS, District Judge: This is a petition to review a decision of the United States Board of Tax Appeals. The facts involved are fully set forth in the opinion of the Board. They may be briefly summarized as follows:

Prior to October 7, 1930 Peerless Explosives Company, Union Explosives Company and its wholly owned subsidiary, Black Diamond Powder Company, were corporations engaged in the manufacture and sale of high explosives in competition with Atlas Powder Company. They were also customers of Atlas. This situation was not satisfactory to Atlas which desired to remove the possible dangerous competition and to acquire for itself the business of these competitors. Early in 1930 the president of Atlas conceived the idea of reorganizing these three companies and consolidating or merging them into a new company which would be controlled by Atlas. In order that the identity of Atlas in the transaction should not be known at the beginning of the negotiations the business was entrusted to H. K. Seligman and W. E. Fletcher as its agents to negotiate with the stockholders of Peerless and Union. They were instructed that Atlas did not desire to purchase either the assets or stocks of Peerless, Union, or Black Diamond, but to reorganize them by the exchange of stocks, into a new company to be controlled by Atlas.

The preliminary negotiations with the majority stockholders of Peerless and Union were conducted by Atlas through its agents, Seligman and Fletcher, without disclosing its identity, until it had secured from said stockholders their oral assurances that they would exchange their stock on the plan proposed. It was made plain from the beginning, however, that a strong financial interest was represented and would participate in the plan by furnishing necessary funds.

The main features of the plan were that Peerless, Union, and Black Diamond were to be consolidated into a new company, Peerless-Union Explosives Corporation, that the stockholders of the old companies would receive for their stock in the old companies stock in the new company, stock in Atlas and some cash. Atlas on its part was to furnish the new company with sufficient cash and sufficient shares of its own common and preferred stock to complete the transaction. In return it was to receive sufficient common and preferred stock in the new company to assure its control.

On October 2, 1930, the board of directors of Atlas approved the proposed plan of reorganization and the action of its executive officers in causing the new company to be formed, and authorized the purchase of all of the preferred stock and a majority of the common stock of the new company for cash and shares of its own preferred and common stock to the amount required to carry out the plan. Thereafter the majority stockholders of Peerless and Union entered into written agreements with Seligman and Fletcher to deliver their shares of stock in Peerless and Union for cash, shares of common stock in the new company, and shares of stock in Atlas to the extent provided for in the plan. Seligman and Fletcher also secured options on practically all of the minority stockholdings in Peerless and Union and on October 7, 1930, the transfers and exchanges were made pursuant to the agreements and plan of reorganization. The assets of the three old corporations, Peerless, Union, and Black Diamond, were transferred to the new company and the old companies were dissolved. At the consummation of the plan the new company was the owner of all the stock and practically all the assets of the old companies and Atlas was the owner of all the preferred stock and over 57% of the common stock of the new company formed by the reorganization.

The respondent was one of the majority stockholders of Peerless. He exchanged his stock in that company for cash, stock in the new company, and stock in Atlas pursuant to the plan of reorganization. His income tax return for the year 1930 was prepared upon the theory that there had been a statutory reorganization effected between the three old companies and the new company and that Atlas was a party to the reorganization. He, therefore, reported no gain as a result of the receipt of the stock of the new company and of Atlas. The petitioner, however, took the position that Atlas was not a party to the reorganization and assessed a tax deficiency against the respondent upon the theory that the Atlas stock he received was "other property" received in a statutory reorganization within the meaning of Section 112 (c) of the Revenue Act of 1928, 45 Stat. 791. Before the Board of Tax Appeals the petitioner changed his position, claiming that by none of the exchanges was a statutory reorganization effected but that the entire transaction constituted a sale and that taxable gain was realized by the respondent upon both the stock of the new company and the stock of Atlas which he received. The Board sustained the contention of the respondent, holding that there had been a statutory

reorganization effected between the three old companies and the new company and that the Atlas was a party thereto. The petitioner thereupon filed his petition to review the decision of the Board.

In this court the petitioner concedes that a statutory reorganization did take place between the three old companies and the new company, but strongly urges that Atlas was not a party to that reorganization. Therefore, he argues, the respondent is taxable upon the gain realized by him upon the receipt of the stock of Atlas which was delivered to him in the transaction.

Section 112 of the Revenue Act of 1928, 45 Stat. 791, provides in part as follows:

"Sec. 112. Recognition of Gain or Loss:

"(a) General rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

"Exchanges solely in kind.—

* * * * * * *

"(3) Stock for stock on reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * * * *

"(c) Gain from exchanges not solely in kind.—(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * * * * * *

"(i) Definition of reorganization.—As used in this section and sections 113 and 115—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the

voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

"(j) Definition of control.—As used in this section, the term 'control' means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation."

Since, as we have seen under the plan of reorganization which was carried through in this case, the new company became the owner of all the assets and practically all the stock of the old companies, there was a merger or consolidation and, therefore, a reorganization within the definition contained in section 112 (i) (1) (A) of the statute. The question presented to us for consideration is whether Atlas was a party to that reorganization. Considering this question we note that the statute defines the term "party to a reorganization" to include both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and of least a majority of the total number of shares of all other classes of stock of another corporation. We also observe that the reorganization in this case contemplated and involved not only the acquisition by the new company of a majority of the stock of all classes of the old companies, but also the acquisition by Atlas of a majority of the stock of all classes of the new company itself. It, therefore, appears that Atlas was a party to the reorganization within the literal terms of the statutory definition.

But even if this were not so we are satisfied that Atlas was a party to the reorganization within the meaning of the statute. The definition contained in the statute is, as this court pointed out in Commissioner of Internal Revenue v. Fifth Avenue Bank of New York, 84 F. (2d) 787, not an all inclusive one but, as the petitioner stated in his interpretative regulations (Article 577, Regs. 74) it "simply enumerates certain cases with respect to which doubt might arise." It seems to us that this fact was overlooked by the Circuit Court of Appeals for the Seventh Circuit in Commissioner of Internal Revenue v. Groman, decided November 30, 1936. Consequently we cannot follow the reasoning of that case, but are constrained to hold that one who is a party to a reorganization transaction as that language is commonly understood is a party within the meaning of the statute.

The Board in its opinion found as a fact upon sufficient evidence: "that the entire idea and plan of reorganization, was conceived by Atlas; that it was in the line of Atlas' business; and that its promotion and execution were entrusted to its agents, Seligman and Fletcher under general instructions. The plan was developed and formed by Atlas and its agents; cash and its own stock necessary to the accomplishment of the transaction were furnished by Atlas; and it became the owner of the majority of the voting stock and of all of the preferred stock of the new company. In short, Atlas was the mainspring of the entire proceeding and without its participation

there would have been no reorganization and consolidation into the new company."

The administrative findings of fact of the Board based upon evidence are conclusive upon this court. Beech v. Commissioner of Internal Revenue, 82 F. (2d) 42; Phillips v. Commissioner, 283 U. S. 589. Upon these findings we fully agree with the Board that a corporation so intimately connected with the reorganization of the other corporation as was Atlas in this case is a party to the reorganization within the commonly understood meaning of that phrase, although not reorganized itself. Commissioner of Internal Revenue v. Fifth Avenue Bank of New York, supra.

The petitioner vigorously urges that a contrary conclusion is compelled by the opinion of this court in Bus & Transport S. Corp. v. Commissioner of Internal Revenue, 79 F. (2d) 509. That case is, however, clearly distinguishable on its facts and is not in any way determinative of the question here involved. As the Supreme Court said, when that case was brought before it (Bus & Trans. Corp. v. Helvering, 296 U. S. 391) "the transactions there involved did not even remotely resemble a merger or reorganization as commonly understood." In the case now before us, however, the petitioner concedes that a reorganization did take place.

The order of the Board of Tax Appeals is affirmed.

A true copy.

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

United States Circuit Court of Appeals for the Third Circuit

No. 6156.—October Term, 1936

Commissioner of Internal Revenue, petitioner

vs.

Raymond I. Bashford, respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be, and the same is hereby affirmed.

Philadelphia, January 22, 1937.

J. W. Thompson,
Circuit Judge.

(Endorsements:) Order affirming decree. Received & filed Jan. 22, 1937. Wm. P. Rowland, clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Commissioner of Internal Revenue, petitioner, vs. Raymond I. Bashford, respondent, No. 6156, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this 15th day of April in the year of our Lord one thousand nine hundred and thirty-seven and of the independence of the United States the one hundred and sixty-first.

[SEAL]

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Supreme Court of the United States

Order allowing certiorari

Filed May 24, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument immediately following No. 854.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CITATIONS

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139792—37——1

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RAYMOND I. BASHFORD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the above cause on January 22, 1937, affirming the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 127) is reported in 33 B. T. A. 10. The opinion of the Circuit Court of Appeals is reported in 87 F. (2d) 827.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 22, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer owned stock in A corporation, which transferred its assets to B corporation in a statutory reorganization. Taxpayer exchanged his stock in A corporation for stock in B corporation, cash and stock in C corporation. C corporation is the parent of B and the instigator of the reorganization plan. The question is whether the gain represented by the C stock is taxable, which depends upon whether the C stock is stock of a corporation a party to the reorganization, under Section 112 (b) (3), or "other property" under Section 112 (c) (1), Revenue Act of 1928.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra,* pp. 14–18.

STATEMENT

The facts, except those disclosed by the testimony of two witnesses, were stipulated before the Board of Tax Appeals (R. 19–56). Separate findings of fact were not made by the Board. Its findings of fact were included in its opinion (R. 127–143), and they may be summarized as follows:

Prior to October 7, 1930, Peerless Explosives Company, Union Explosives Company and the latter's wholly owned subsidiary, Black Diamond Powder Company, called herein Peerless, Union and Black Diamond, were corporations engaged in the manufacture and sale of explosives. They were incorporated in the States of Delaware, West Virginia and Pennsylvania, respectively. (R. 19–20, 128.) These corporations were both purchasers from and competitors of Atlas Powder Company, herein called Atlas, a Delaware corporation (R. 129). Atlas was not satisfied with its position of rivalry with the other three corporations and desired to remove the competition and acquire the business of Peerless, Union and Black Diamond. Early in 1930, its president conceived the plan of attaining this end by means of reorganizing the three competitive companies into a new corporation to be controlled by Atlas. In order that its identity would not be apparent, the early negotiations to carry out this plan were made on behalf of Atlas by individual agents. (R. 129–130.) The identity of Atlas was not disclosed until the agents had secured from the majority stockholders of Peerless and Union their oral assurances that they would exchange their stock under the plan proposed (R. 130). It was stressed by the agents in dealing with the stockholders that a strong financial interest was represented and would participate in the plan by furnishing funds, and that the two agents

of Atlas and the principal stockholders of Peerless and Union would be officers in the new company (R. 130).

The main features of the reorganization plan were that Peerless, Union and Black Diamond were to be consolidated into Peerless-Union Explosives Company, herein called the new company, that the holders of stock of the old companies would receive for that stock cash, Atlas stock and stock in the new company, and that Atlas would furnish the new company with sufficient cash and stock in Atlas to complete the transaction in exchange for controlling amounts of the new company's common and preferred stock (R. 130–131).

On September 22, 1930, Atlas caused the new corporation to be incorporated under the laws of Delaware for the purpose of acquiring the business and assets of Peerless, Union and Black Diamond. Atlas subscribed to all of the original issue of stock of the new company, 10 shares of common and 10 of preferred, all of which was issued to Atlas. Later the capital stock of the new company was greatly increased. On October 2, 1930, the board of directors of Atlas approved the proposed reorganization and the incorporation of the new company and authorized its officers to invest in the capital stock of the new company to a substantial extent in consideration of $960,560.25 in cash and shares of common and preferred stock of Atlas. (R. 131–132.)

On October 7, 1930, the majority stockholders of Peerless and Union entered into written contracts with the agents of Atlas to deliver their shares of stock in their respective corporations to the agents, who were acting as promotors of the new company, in exchange for cash, shares of common stock of the new company and shares of common and preferred stock of Atlas in agreed amounts. Certain warranties and agreements as to carrying out the reorganization were made by the agents. (R. 132–135.) On the same day, October 7, 1930, the agents of Atlas and the new company contracted in writing that the agents would exchange for cash, stock in Atlas and stock in the new company the stock in the old companies which they had obtained. There were further agreements relative to the employment of stockholders of the old companies by the new, to the dissolution of the old companies and the acquisition of their assets and the assumption of their liabilities, and to the reimbursement of stockholders for any income tax imposed upon them growing out of the transaction. (R. 135.) Atlas' agents also secured options on practically all the minority stockholdings in Peerless and Union.

On October 7, 1930, the transfers and exchanges were made pursuant to the agreements and reorganization plan. The old companies were dissolved. The result was that the new company was the owner of practically all the stock and all the assets of the old companies. Atlas was the owner

of all the preferred stock and over 57% of the common stock of the new company. (R. 135–136.)

The taxpayer, respondent herein, was one of the majority stockholders of Peerless. His part in the plan was the exchange of his stock in Peerless for cash, stock in the new company and Atlas stock. (R. 132–133.) The Commissioner of Internal Revenue assessed a deficiency against him (R. 12–14) upon the theory that there had been a statutory reorganization effected between the three old companies and the new company as the latter had acquired all the stock and assets of the former, but that, as to Atlas, it was not a party to such reorganization, and, therefore, its common and preferred stock received in exchange by the taxpayer was to be treated as "other property" in the statutory reorganization and the gain thereupon was to be recognized along with the cash received, under the provisions of Section 112 (c) (1), Revenue Act of 1928, *infra,* pp. 14–15.

Before the Board, the Commissioner changed his position and claimed that no statutory reorganization was effected, but that the entire transaction constituted a sale, and that the gain upon both the stock of the new company and Atlas Powder Company should be recognized (R. 139).

The Board of Tax Appeals sustained the contentions of the taxpayer and held that there had been a statutory reorganization effected between the three old companies and the new corporation

and that the Atlas Powder Company was a party thereto by reason of its initiation of and intimate connection with the plan. Consequently, the gain upon the Atlas stock was held to be unrecognized under Section 112 (b) (3). (R. 141–142.) This decision of the Board was based upon its former decision in *Fifth Avenue Bank of New York* v. *Commissioner,* 31 B. T. A. 945, affirmed by the Circuit Court of Appeals for the Third Circuit, June 16, 1936, 84 F. (2d) 787.

In the Circuit Court of Appeals the Commissioner conceded that a statutory reorganization had been effected between the new corporation and the three smaller companies by reason of the acquisition by the former of practically all the stock and all of the assets of the latter. The Commissioner contended, however, that Atlas was not a party to the reorganization within the statutory definition of that term, and that the intimate connection of Atlas with the reorganization and the participation of its subsidiary did not render Atlas a party.

The court held Atlas was a party to the reorganization within the literal terms of the statutory definition because Atlas had acquired a majority of the stock of all classes of the new company. The court further held Atlas a party to the reorganization, within the commonly understood meaning of that phrase, because of its intimate connection with the plan.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Atlas was a party to the reorganization effected by its subsidiary with three other corporations.

2. In holding that Atlas was a party to the reorganization, within the literal terms of the statutory definition, because it had acquired a majority of the stock of all classes of its subsidiary.

3. In holding that Atlas was a party to the reorganization effected by its subsidiary by reason of its intimate connection with such reorganization.

4. In failing to hold that Atlas was not a party to the reorganization effected by its subsidiary.

5. In failing to hold that the stock of Atlas received by the taxpayer did not represent a continuing interest in the same enterprise.

6. In failing to hold that the stock of Atlas received by the taxpayer represented "other property" on which gain is recognized under Section 112 (c) (1), Revenue Act of 1928.

7. In affirming the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. Whether a corporation which forms a subsidiary corporation for the purpose of acquiring the assets and properties of a third corporation is a party to the statutory reorganization resulting from such acquisition and control by the subsidiary of another corporation is an important question of

Federal law, under the reorganization provisions of the Revenue Acts, which has not been but should be settled by this Court. In the instant case the court below determined that Atlas, the parent corporation, was a party to such reorganization within the literal terms of the statutory definition because the parent acquired a majority of the stock of all classes of the new, or subsidiary, company. Neither the governing statute, Section 112 (i) (1) (2), Revenue Act of 1928, *infra,* p. 16, nor the regulations promulgated thereunder, Treasury Regulations 74, Article 577, *infra,* p. 17, provide that a parent corporation is to be considered a party to a reorganization to which its subsidiary is a party.[1] We believe that the decision of the court below upon this point misapprehends the question involved and adopts an erroneous construction and extension of the statutory definition of the term "a party to a reorganization."

In the instant case the taxpayer, a stockholder in Peerless, a party to the reorganization and one of the transferring corporations, exchanged his stock therein for cash, stock of the acquiring subsidiary and stock of Atlas, the parent. The ultimate question is whether the gain upon the stock of the parent is free from recognition under Section 112 (b) (3), on the ground that the parent was a party to such reorganization. The underlying question thus would seem to be whether the stock

[1] This is equally true under prior Acts and Regulations.

of a parent company, which in turn owns the stock of a subsidiary, carries with it the necessary continuity of interest in the assets and affairs of the subsidiary so that any gain thereon is unrecognized to the same extent as on the receipt of stock in the corporation acquiring the assets. We believe that the decisions of this Court and the approved decisions of the Circuit Courts of Appeals require a negative answer.

In *Bus & Trans. Corp.* v. *Helvering,* 296 U. S. 391, it was contended on behalf of the Government that stock in a corporation which controlled the assets and properties transferred by the taxpayer did not represent the intimate interest in the affairs of the transferee required by the statute. While this Court there held that the transactions involved did not resemble either merger or reorganization, this Court further held that, "Neither party to the exchange acquired any definite immediate interest in the other" (p. 393). So, in the instant case, it is believed the stock of the parent corporation, Atlas, in the hands of the taxpayer does not represent any definite immediate interest in the transferred assets acquired by the new, or subsidiary, corporation.

Such conclusion is also supported, we believe, by the decision of this court in *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 385, and by *Cortland Specialty Co.* v. *Commissioner,* 60 F. (2d) 937, 940 (C. C. A. 2d), certiorari denied, 288 U. S. 599, approved

in *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462. We find no authoritative court decision to the contrary.

2. The court below decided in the instant case that, even if Atlas were not a party to the reorganization by reason of its acquisition of the subsidiary corporation's stock, it was a party, within the meaning of the statute, because of its intimate connection with the reorganization of the other corporations. This conclusion of the court rests upon the finding of the Board of Tax Appeals that the entire idea and plan of reorganization was conceived and executed by Atlas, that it furnished the necessary cash and its own stock to carry out the plan and without its participation there would have been no reorganization. This was the basis for the Board's decision and the court below affirmed the conclusion of the Board that Atlas was a party to the reorganization because it was thus the motivating force of the entire proceeding.

Upon this question the decision of the court below appears to be squarely in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Commissioner* v. *Groman,* 86 F. (2d) 670, in which a petition for certiorari, filed by the taxpayer, is now pending in this Court, No. 854, October Term, 1936. In the *Groman* case, the Government is filing a memorandum on behalf of the Commissioner in which it is pointed out that in view of the contrary constructions of the statutory

definition adopted in these two cases, involving almost identical transactions, the Commissioner does not feel warranted in opposing that petition.

The court below recognized that its decision upon this point was contrary to the construction of the definition "a party to a reorganization" adopted by the Circuit Court of Appeals for the Seventh Circuit, but felt constrained to reach a different conclusion. The facts of the *Groman* case are sufficiently similar to those in this case to require the conclusion that there is a direct conflict between the two decisions. Those facts are, of course, set out in the record, petition and memorandum filed in that case, and will not be repeated here. It is sufficient here to say that in that case, as in the instant case, the corporation which motivated the entire reorganization scheme furnished the necessary cash and stock to carry out the reorganization and after the consummation of the plan was in control of the new company.

The only distinction between the facts of the instant case and the *Groman* case is that in the latter the parent corporation, while it acquired all the common stock of the new company, acquired none of the preferred stock, as did Atlas. Such a distinction was not regarded as material by either court in construing the term "a party to a reorganization" involving a parent corporation and its subsidiary.

In view of the relative importance of the question involved and the obvious conflict in these two cases, it is believed the petition for certiorari should be granted by this Court and the conflict resolved.

CONCLUSION

Wherefore, it is respectfully prayed that this petition be granted.

STANLEY REED,
Solicitor General.

APRIL 1937.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * * *

(3) *Stock for Stock on Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *Same—Gain of Corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * * *

(c) *Gain from exchanges not solely in kind.*—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange

consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(d) *Same—gain of corporation.*—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganiza-

tion, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.*—As used in this section, the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 577. *Definitions.*—The term "reorganization" as used in sections 112, 113, and 115 means—
>
> (1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),
>
> (2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,
>
> (3) A recapitalization, or
>
> (4) A mere change in identity, form, or place of organization, however effected.
>
> The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.
>
> A person is, or two or more persons are, "in control" of a corporation, within the meaning of section 112, when owning—
>
> (1) At least 80 per cent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 574 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

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No. 33.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RAYMOND I. BASHFORD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 137–143) is reported in 33 B. T. A. 10. The opinion of the Circuit Court of Appeals (R. 202–206) is reported in 87 F. (2d) 827.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 22, 1937 (R. 206). The petition for writ of certiorari was filed April 22, 1937, and was granted May 24, 1937 (R. 208). The jurisdiction of this Court rests on Section 240 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer owned stock in A corporation, which transferred its assets to B corporation in a statutory reorganization. Taxpayer exchanged his stock in A corporation for stock in B corporation, cash, and stock in C corporation. C corporation is the parent of B and the instigator of the reorganigation plan. The question is whether the gain represented by the C stock is taxable. This depends upon whether the C stock is stock of a corportion a party to the reorganization, under Section 112 (b) (3), or "other property" under Section 112 (c) (1), Revenue Act of 1928.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra,* pp. 37–41.

STATEMENT

The facts in this case, except those disclosed by the testimony of two witnesses, were stipulated before the Board of Tax Appeals (R. 19–56). Attached to the stipulation as exhibits (R. 57–126) are the several documents and agreements referred to herein. Separate findings of fact were not made by the Board. Its findings of fact were included in its opinion (R. 127–143), and may be summarized as follows:

On and prior to October 7, 1930, the Peerless Explosives Company, a Delaware corporation, herein called Peerless, was engaged in the manufacture

and sale of explosives. Its stock issued and outstanding on that date consisted of 17,672 shares of preferred stock of a par value of $25 per share and 14,890 shares of common stock of no par value. Bashford, the taxpayer herein, was the owner of 2,541 shares of its common and 28 shares of its preferred stock. (R. 19, 26, 128.)

On and prior to October 7, 1930, the Union Explosives Company, a West Virginia corporation, herein called Union, was engaged in the manufacture and sale of explosives. It had outstanding 3,367½ shares of preferred stock of a par value of $100 per share and 4,044 shares of common of no par value. (R. 19, 128.)

On and prior to October 7, 1930, the Black Diamond Powder Company, a Pennsylvania corporation, herein called Black Diamond, was engaged in the powder business. It had outstanding 1,584 shares of common stock of the par value of $100 per share, all of which was owned by Peerless. (R. 20, 128.)

Peerless, Union and Black Diamond were all purchasers from and competitors of the Atlas Powder Company, herein called Atlas, a Delaware corporation which had issued and outstanding 261,438¾ shares of common stock of no par value, including treasury stock, and 96,318 shares of preferred stock of $100 par value (R. 21, 128–129). Atlas was not satisfied with its position of rivalry with the other three corporations and desired to

remove the competition and acquire the business of Peerless, Union and Black Diamond. Early in 1930, its president conceived the plan of attaining this end by means of reorganizing the three competitive companies into a new corporation to be controlled by Atlas. In order that its identity would not be apparent, the early negotiations to carry out this plan were made on behalf of Atlas by individual agents. (R. 129–130.) The identity of Atlas was not disclosed until the agents had secured from the majority stockholders of Peerless and Union their oral assurrances that they would exchange their stock under the plan proposed (R. 130). It was stressed by the agents in dealing with the stockholders that a strong financial interest was represented and would participate in the plan by furnishing funds, and that the two agents of Atlas and the principal stockholders of Peerless and Union would be officers in the new company (R. 130).

The main features of the reorganization plan were that Peerless, Union and Black Diamond were to be consolidated into Peerless-Union Explosives Corporation, herein called the new company, that the holders of stock of the old companies would receive for their stock cash, Atlas stock and stock in the new company, and that Atlas would furnish the new company with sufficient cash and Atlas stock to complete the transaction in exchange for controlling amounts of the new company's common and preferred stock (R. 130–131).

On September 22, 1930, Atlas caused the new corporation to be incorporated under the laws of Delaware for the purpose of acquiring the business and assets of Peerless, Union and Black Diamond. Atlas subscribed to all of the original issue of stock of the new company, 10 shares of common and 10 of preferred, all of which was issued to Atlas. Later the authorized capital stock of the new company was increased to 100,000 shares of common of no par value and 50,000 shares of preferred of $100 par value, of which there would be outstanding 21,732 shares of preferred and 65,000 shares of common (R. 131, 132). On October 2, 1930, the board of directors of Atlas approved the proposed reorganization and the incorporation of the new company and authorized its officers to invest in the capital stock of the new company up to an aggregate of 21,732 shares of the preferred stock of the new company and 32,198 shares of its common stock. In consideration therefor Atlas was to deliver to the new company $960,560.25 in cash, 6,318 shares of Atlas preferred stock on the basis of $100 per share, and 8,712½ shares of Atlas common stock on the basis of $66.66⅔ per share (R. 131–132).

On October 7, 1930, the majority stockholders of Peerless and Union, including the taxpayer, entered into written contracts with the agents of Atlas to deliver their shares of stock in their respective corporations to the agents, who were acting as promoters of the new company, in exchange

for cash, shares of common stock of the new company and shares of common and preferred stock of Atlas in agreed amounts. Certain warranties and agreements as to carrying out the reorganization were made by the agents. (R. 49–83, 132–135.) On the same day, October 7, 1930, the agents of Atlas and the new company contracted in writing that the agents would exchange for cash, stock in Atlas and stock in the new company the stock in the old companies which they had obtained. There were further agreements relative to the employment of stockholders of the old companies by the new, to the dissolution of the old companies and the acquisition of their assets and the assumption of their liabilities, and to the reimbursement of stockholders for any income tax imposed upon them growing out of the transaction. (R. 83–88, 135.) Atlas' agents also secured options on practically all the minority stockholdings in Peerless and Union (R. 135–136).

On October 7, 1930, the transfers and exchanges were made pursuant to the agreements and reorganization plan. The assets of Peerless, Black Diamond and Union were transferred to the new company, and the old companies were dissolved. The result was that the new company was the owner of practically all the stock and all the assets of the old companies. Atlas was the owner of all the preferred stock and over 57% of the common stock of the new company. (R. 135–136.)

The taxpayer was one of the majority stockholders of Peerless. His part in the plan was the exchange of his stock in Peerless for cash, stock in the new company and Atlas stock. (R. 132–133.) The Commissioner of Internal Revenue assessed a deficiency against him (R. 12–15) upon the theory that there had been a statutory reorganization effected between the three old companies and the new company, as the latter had acquired all the stock and assets of the former, but that, as to Atlas, it was not a party to such reorganization, and, therefore, its common and preferred stock received in exchange by the taxpayer was to be treated as "other property" in the statutory reorganization and the gain thereupon was to be recognized along with the cash received, under the provisions of Section 112 (c) (1), Revenue Act of 1928, *infra*, p. 37.

Before the Board, the Commissioner changed his position and claimed, in addition, that no statutory reorganization was effected, but that the entire transaction constituted a sale, and that the gain upon both the stock of the new company and Atlas Powder Company should be recognized (R. 139).

The Board of Tax Appeals sustained the contentions of the taxpayer and held, first, that there had been a statutory reorganization effected between the three old companies and the new corporation and, second, that the Atlas Powder Company was a party thereto by reason of its initiation

of and intimate connection with the plan. Consequently, the gain upon the Atlas stock was held to be unrecognized under Section 112 (b) (3), *infra*, p. 37. This decision of the Board was based upon its former decision in *Fifth Avenue Bank of New York* v. *Commissioner*, 31 B. T. A. 945, affirmed by the Circuit Court of Appeals for the Third Circuit, June 16, 1936, 84 F. (2d) 787. (R. 141–142.)

In the Circuit Court of Appeals the Commissioner conceded that a statutory reorganization had been effected between the new corporation and the three smaller companies by reason of the acquisition by the former of practically all the stock and all of the assets of the latter. The Commissioner contended, however, that Atlas was not a party to the reorganization within the statutory definition of that term, and that the intimate connection of Atlas with the reorganization and the participation of its subsidiary did not render Atlas a party. (R. 204.)

The court held Atlas was a party to the reorganization within the literal terms of the statutory definition because Atlas had acquired a majority of the stock of all classes of the new company. The court further held Atlas a party to the reorganization, within the commonly understood meaning of that phrase, because of its intimate connection with the plan.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Atlas was a party to the reorganization effected by its subsidiary and three other corporations.

2. In holding that Atlas was a party to the reorganization, within the literal terms of the statutory definition, because it had acquired a majority of the stock of all classes of its subsidiary.

3. In holding that Atlas was a party to the reorganization effected by its subsidiary by reason of its intimate connection with such reorganization.

4. In failing to hold that Atlas was not a party to the reorganization effected by its subsidiary.

5. In failing to hold that the stock of Atlas received by the taxpayer did not represent a continuing interest in the same enterprise.

6. In failing to hold that the stock of Atlas received by the taxpayer represented "other property" on which gain is recognized under Section 112 (c) (1), Revenue Act of 1928.

7. In affirming the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

There was a reorganization between Peerless, Union, Black Diamond, and the new company. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378. But Atlas was not reorganized and, neither within the literal terms of the statutory definition nor within its purpose, was it a party to the reorganization.

I

The definition of "a party to a reorganization" is found in Section 112 (i) (2). It follows the definition of "reorganization" found in Section 112 (i) (1) and plainly must be read in connection with the definition of a reorganization. Atlas did not participate in the reorganization of Peerless, as defined in Section 112 (i) (1), and cannot, therefore, reasonably be said to have been a party to it. Section 112 (i) (2) includes a corporation which acquires "a majority of the voting stock and * * * all other classes of stock of another corporation." This plainly refers to the parenthetical explanation of merger or consolidation which is found in the definition of a reorganization and is not intended to bring into the definition of "a party to a reorganization" a corporation which was not reorganized.

We may assume that there was a reorganization between Atlas and the new company. But since the taxpayer was a stockholder of Peerless, the only question is whether Atlas was a party to the Peerless reorganization.

Atlas can be considered a party to this reorganization only if it be viewed as standing in the shoes of its subsidiary, the new company. Especially in the case of the reorganization provisions of the statute, which precisely define the degrees and types of corporate control, there is no warrant for looking through the separate corporate entities of Atlas and its subsidiary.

II

The court below also placed its decision upon the somewhat paradoxical ground that a corporation may be a party to the reorganization, although not reorganized itself, so long as it plays a sufficiently active role in the reorganization negotiations and financing. In this case Atlas took great pains to keep separate from the new company. If it deliberately cast itself in the role of a stranger to the reorganization, it hardly can claim a tax status based upon the proposition that it instigated the reorganization, or that as a matter of business practice it might just as well have absorbed the smaller corporations.

In *Bus & Transport Corp.* v. *Helvering,* 296 U. S. 391, this Court held that stock in a corporation which was a necessary step in the transfer of assets, and whose only asset was stock in a corporation which instigated the transaction, did not give the transferor the definite immediate interest in the corporation to which the assets were transferred. The principle of this decision seems necessarily to be that the transferor must have a direct stock ownership in the corporation to which the assets were transferred, and that, however important the part played by the instigator, its stock cannot be taken to be that of a party to the reorganization.

This principle is a necessary outgrowth of the established doctrine that the stock must represent a continuing and direct interest in the assets which

the transferee received. Plainly, stock in another corporation does not provide a definite and direct interest in the assets, even though the second corporation may own stock in the transferee.

We think it clear that the taxpayer has not been able to establish a right to the benefit of the statutory exemption. To obtain its benefits he must bring himself squarely within the language relied upon. *Burnet* v. *Houston,* 283 U. S. 223, 227; *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440. This the taxpayer has not done. It follows that the Atlas stock represents "other property" within the meaning of Section 112 (c) (1) and the gain realized on its receipt must be recognized.

ARGUMENT

I

ATLAS WAS NOT A PARTY TO THE REORGANIZATION WITHIN THE LITERAL TERMS OF THE STATUTORY DEFINITION

The taxpayer in this case, one of the majority stockholders in Peerless, exchanged his stock therein for stock of the new company, stock of Atlas and cash. The ultimate question for determination is whether the gain upon this exchange, to the extent represented by the Atlas stock, must be treated as having been received without recognition under the provisions of Section 112 (b) (3) of the Revenue Act of 1928, *infra,* p. 37, or whether it is subject to tax as gain upon "other property"

within the meaning of Section 112 (c) (1) of that Act. The correct determination of this question depends upon whether Atlas was a party to the statutory reorganization concededly effected between Peerless, Union, and Black Diamond on the one hand, and the new corporation on the other.

The decision of the court below that there was a reorganization between Peerless, Union, Black Diamond and the new company is in accordance with the rule laid down by this Court in *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378; *Helvering* v. *Watts*, 296 U. S. 387; *G. & K. Mfg. Co.* v. *Helvering*, 296 U. S. 389; and *Nelson Co.* v. *Helvering*, 296 U. S. 374. But Atlas was not a party to those exchanges between the old companies and the new company which did constitute a statutory reorganization, and acquired neither the assets nor any of the stock of the old companies. Instead the assets and stock of the old companies were acquired by Atlas' subsidiary, the new company, which was a separate and distinct corporate entity. We contend that it is manifest that one corporation is not a party to a reorganization, either within the literal language of the reorganization statute or its spirit, merely because another corporation, which it controls, is a party. The court below did not expressly hold that Atlas was a party to the reorganization because its subsidiary was a party, although this seems to be the necessary effect of its decision. It held, instead, that Atlas was a party to the reorganization because (1) it came within

the literal terms of the statutory definition[1] and (2) it was "the mainspring of the entire proceeding." The Board of Tax Appeals reached a similar conclusion because of the second ground alone. In this section we shall discuss the first ground relied upon by the court below.

1. Section 112 (i) (1) limits the term "reorganization" to five types of transactions: a merger, a consolidation, a transfer of assets to a corporation controlled by the transferor, a recapitalization, or a mere change in corporate identity. There is no contention that Peerless and Atlas bore any such relation to each other.

Immediately following this definition of "reorganization", Section 112 (i) (2) provides:

> The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

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[1] Respondent appears to be under the impression that this question is raised for the first time in our petition for certiorari (Br. in Opp. 8–9). Apart from the fact that this Court will consider the ground of decision (see Br. in Opp., 14) whether or not urged in the court below, it is perfectly plain that petitioner at every stage of this litigation has urged that Atlas was not a party to the reorganization (R. 141–142, 145, 147, 148–149, 204). It would be difficult to find a contention which more squarely raises the construction of the statutory definition of a "party to the reorganization".

This definition must, of course, be read with the definition of "reorganization". If there was no reorganization transaction between Peerless and Atlas, the latter cannot be a "party to the transaction" so far as the respondent, a stockholder of Peerless, is concerned.

It is true that Atlas acquired "a majority of the voting stock and * * * all other classes of stock of another corporation." But this corporation was Peerless-Union, the new company. It was not Peerless. Respondent would hardly contend that Atlas would be made a party to the Peerless reorganization merely because it had simultaneously acquired the majority of the stock of, say, the Pennsylvania Railroad Company. The clause in Section 112 (i) (2) relating to stock acquisition repeats the parenthetical explanation of merger or consolidation found in Section 112 (i) (1) (A) and is plainly designed only to insure that *both* corporations, in the case of a reorganization by stock acquisition, are considered parties to the reorganization. Thus, the House Ways and Means Committee explained the definition of a "party to a reorganization", when it first appeared, as Section 203 (h) (2) of the Revenue Act of 1924, as follows (H. Rep. No. 179, 68th Cong., 1st Sess., p. 16):

> (2) There is no provision of the existing law which corresponds to subdivision (h) (2) of the bill. This definition is inserted to remove any doubt as to whether a corpora-

> tion, all the stock of which is acquired in connection with the reorganization, is a party to the reorganization.

The Senate Committee on Finance used an identical explanation. S. Rep. No. 398, 68th Cong., 1st Sess., p. 17. It is evident that the legislative intent was confined to insuring that the corporation whose stock was acquired in a statutory reorganization would be considered a party.[2]

In this case Atlas acquired the majority of the stock of a corporation which itself was a part of the Peerless reorganization. This meant that respondent and Atlas were both stockholders of the new company. But since there was no reorganization between Peerless and Atlas, the fact that Atlas acquired a majority of the stock of the new company is wholly irrelevant to the question of whether Atlas was a party to the Peerless reorganization.

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[2] Similarly, when the definition of "reorganization" was changed in the Revenue Act of 1934 to limit clause (A) of Section 112 (g) (1) to a statutory merger or consolidation, and the case of acquisition of 80 per cent of the voting and other classes of stock put in a separate clause (B), a corresponding change in the definition of "a party to a reorganization" was made in Section 112 (g) (2), which provides:

"The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of a reorganization resulting from the acquisition by one corporation of stock or properties of another."

It hardly would be contended that Atlas would come within the definition under the Act of 1934, yet the earlier Acts are equally plainly restricted to corporations which are reorganized or which themselves absorb reorganized corporations.

The purpose of the reorganization provisions of the Revenue Acts is to except from the general rule certain specifically described exchanges incident to such readjustment of corporate structures, which are made in one of the particular ways specified in their provisions, and which effect only a readjustment of continuing interests in property under modified corporate forms. In order to exclude transactions not intended to be included, the specifications of the reorganization provisions of the law are precise. Both the terms of the specifications and their underlying assumptions and purposes must be satisfied in order to entitle the taxpayer to the benefit of the exceptions from the general rule.

Article 577, Treasury Regulations 74, *infra*, p. 39, promulgated thereunder, does not enlarge the statutory definition, but does point out that the definition is not all-inclusive and that it simply enumerates certain cases with respect to which doubt might arise. While it may be that the statutory definition and the regulations construing it are not all-inclusive, it is obvious that nothing in Article 577 purports to include as "a party to a reorganization" a corporation which did not enter into a reorganization with the corporation of which the taxpayer was a stockholder.

The taxpayer here cannot rely on a long continued administrative practice such as that which in *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, was used in construing the statutory definition of a reorganization. In that case the regulations and

the practice of the Commissioner alike supported the view that clause (A) was not to be limited to transactions which were, or were similar to, technical mergers or consolidations. See 76 F. (2d) 797, 799, 800. Here the Regulations throw no light on the question and there are no rulings by the Bureau of Internal Revenue. So far as we can ascertain, the Commissioner has never treated a corporation as a party to the reorganization merely because it at that time acquired the majority of the stock of a corporation which was a party.

2. As there was more than one transfer involved in this case the transfers must be distinguished. It was the failure of the court below to distinguish the separate transactions which, we submit, led it into its erroneous decision that Atlas was a party to the Peerless reorganization.

The transaction whereby Atlas exchanged cash and its own preferred and common stock for a majority of all classes of stock of the new company may for present purposes be said to have constituted a statutory reorganization. The only way in which the court's conclusion that Atlas was a party to a reorganization, "within the literal terms of the statutory definition", can be reconciled with the undisputed facts in this case is to accept the view that the court had reference to the exchanges between Atlas and the new company. The language of the opinion itself indicates these were the exchanges which the court had in mind (R. 205).

But it is clear that Atlas was not a party, either in fact or within the language of the statute, to the exchanges between the new company and old companies which constituted the statutory reorganization out of which the present taxable transaction arose. *Commissioner* v. *Groman,* 86 F. (2d) 670 (C. C. A. 7th), pending in this Court, No. 21, October Term, 1937. Cf. *Bus & Trans. Corp.* v. *Helvering,* 296 U. S. 391. Respondent was a stockholder in Peerless, not Atlas, and the Atlas stock is recognized as gain unless Atlas was a party to the *Peerless* reorganization.

It is our contention that the transactions between the new company and Atlas on the one hand and between the new company and the old competing companies on the other were separate. It is true that the transactions were related, in the sense that probably neither would have been consummated had it not been for the other. But "that fact would not convert the two sales into one." *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, 496. The agreement pursuant to which the Peerless assets and stock were transferred gave no rights to Atlas and imposed no duties on it save guaranteeing performance by the new company of some of its obligations (R. 91, 95, 100). Atlas was in no sense a party to the exchange of property and stock which constitued the Peerless reorganization.

It is to be noted that this contention that the transfers were separate does not ask that separate

steps in a plan of reorganization be viewed as independent transactions with legal consequences different from those which would result were the plan examined at its completion. See, *e. g., Bassick* v. *Commissioner,* 85 F. (2d) 8 (C. C. A. 2d), certiorari denied, 299 U. S. 592; *Ahles Realty Corp.* v. *Commissioner,* 71 F. (2d) 150 (C. C. A. 2d), certiorari denied, 293 U. S. 611; *Stark* v. *Commissioner,* 82 F. (2d) 964 (C. C. A. 4th), certiorari denied, 298 U. S. 680. At no stage in the transactions in this case was Atlas a party to the Peerless reorganization; at the completion as at the outset of these transactions its only relation to the Peerless reorganization was that its subsidiary, the new company, was a party.

3. The view of the court below seems in essence to be that Atlas comes within the statutory definition of a party to the reorganization because it owned a majority of the stock of the new company, which was concededly a party to the reorganization. But this view requires that the Court look through the corporate entities of Atlas and the new company and that it view them as identical, even though 43 per cent of the voting stock of the new companies was owned by persons other than Atlas (R. 136), and even though Atlas itself was insistent that the new company be separate and distinct (see *infra,* pp. 25–26). "Certainly, under the general rule for tax purposes a corporation is an entity distinct from its stockholders." *Dalton* v. *Bowers,*

287 U. S. 404, 410. See also *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415. Even where affiliated corporations file consolidated returns, they remain separate taxpayers. *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 328; *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 127. The necessity of maintaining the separate identity of parent and subsidiary is doubly apparent in the case of the reorganization provisions of the statute, where the degrees and types of corporate control and reorganization are defined with a meticulous precision.

A similar question was presented in *Union Trust Co.* v. *Heiner* (W. D. Pa.), decided February 24, 1937, not reported but found in 1937 Prentice-Hall, Vol. 1, par. 1218. The court there held that the parent was not a party to a reorganization in which the assets were transferred to a subsidiary. It accordingly held that stock of the parent, received by the transferors, must be taxed as realized gain.

If, as seems plainly to be the case, it is impossible to regard the parent as standing in the shoes of its reorganized affiliate, there is no warrant for the view that Atlas was a party to the reorganization under the statutory definition. Respondent retained an interest in the assets transferred from Peerless only because of his ownership of stock in the new company. Apart from the fact that Atlas owned stock in the new company, respondent's holding of Atlas stock represented no more of a

continuing interest in the Peerless assets than did the cash which he received.

4. Section 112 (c) (1), *infra*, provides that if an exchange would be nontaxable if it were not for the fact that the property received in exchange consists not only of property permitted by the reorganization sections to be received without the recognition of gain but of other property or cash, then the gain to the recipient should be recognized to the extent of the cash plus "the fair market value of such other property". Here, the taxpayer received in exchange for his stock (1) shares of the company to which his stock was transferred, (2) shares of Atlas, the parent company of the transferee, and (3) cash. The Atlas Company was not "a party to a reorganization", within the meaning of Section 112 (i) (2) of the Revenue Act of 1928, *infra*, since it acquired neither the stock nor the assets of Peerless, the taxpayer's corporation, but figured only as the instigator of the reorganization of the other companies. It is clear that what was done "was not aptly described by the words of the statute." *Rogers* v. *Strong*, 72 F. (2d) 455, 457, (C. C. A. 3d), certiorari denied, 293 U. S. 621. Hence, there was no literal compliance by Atlas with the language of either Section 112 (i) (1) or (i) (2) and, unless it may be deemed a party to the reorganization for reasons not based on the literal language of the statute, its shares constitute "other property" and must be treated as taxable income, along with the cash.

II

ATLAS WAS NOT A PARTY TO THE STATUTORY REORGANIZATION BECAUSE IT CONCEIVED AND EXECUTED A GENERAL PLAN WHICH INCLUDED SUCH A REORGANIZATION

It is also plain, we submit, that the court below was in error in holding that "one who is a party to a reorganization transaction as that language is commonly understood is a party within the meaning of the statute" and that "a corporation so intimately connected with the reorganization * * * is a party to the reorganization within the commonly understood meaning of that phrase, although not reorganized itself." (R. 205, 206.) This conclusion of the court is based upon the following facts: that Atlas conceived and executed, through its agents, the entire idea and plan whereby it obtained control, through the medium of a subsidiary corporation, of all the assets and properties of Peerless, Union, and Black Diamond; that Atlas furnished cash and enough of its own stock to accomplish the transaction; that Atlas was the "mainspring" of the entire proceeding, and without its participation there would have been no reorganization and consolidation into the new company (R. 205–206). These facts also form the basis of the Board's decision that "where the corporation is so intimately connected with the reorganization of other corporations that the reorganization depends upon its efforts or support, then such corporation is a party

to the reorganization although it is not reorganized itself" (R. 141–142).

1. These conclusions of the Board and the court below seem based upon the principle that a stranger to the actual reorganization may yet be a party to the reorganization if it plays a sufficiently active part in instigating and carrying out the plan.[3] The reasoning of the decision would seem probably to be applicable whether or not the new company was a subsidiary of Atlas. It would permit, for example, stockholders in corporations operating cotton mills to receive without recognition of gain stock in a mail order house which, for one reason or another, instigated a consolidation of the mills into a single concern. This, we submit, is a thoroughly unreasonable result and illustrates the difficulties inherent in the paradoxical position that a corporation may be a party to a reorganization although

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[3] The legislative history of the reorganization provisions throws no light upon the question as to whether a corporation may be considered a party to a reorganization merely because it plays an active role in instigating and financing the reorganization, except so far as it indicates that Congress had a quite different purpose in mind in enacting the definition of a "party to a reorganization." See pp. 15–16, *supra*.

We are informed that, although there have been no formal rulings, the Commissioner has consisently refused to allow such corporations to be treated as a party to the reorganization. See, for example, his position in *Tulsa Oxygen Co.* v. *Commissioner*, 18 B. T. A. 1283; *Fifth Avenue Bank* v. *Commissioner*, 31 B. T. A. 945, 84 F. (2d) 787 (C. C. A. 3rd); *Commissioner* v. *Groman*, 86 F. (2d) 670 (C. C. A. 7th), as well as in this case.

not itself reorganized (or absorbing a reorganized corporation).

It may be argued that, as a matter of business practice, it is immaterial whether Atlas chose to consolidate the old companies into a subsidiary of Atlas or to absorb them by a direct merger and that, in the latter case, respondent could have received Atlas stock without recognition of gain. Even if this were the case, tax law looks to "what was done, rather than the design and purpose of the participants." *United States* v. *Phellis,* 257 U. S. 156, 172; *Weiss* v. *Stearn,* 265 U. S. 242, 254. However, the facts of this case make it plain that there were important differences between direct absorption by Atlas of the old companies and their consolidation or merger into a subsidiary of Atlas.

The reorganization was part of a circuitous and involved scheme conceived and executed by Atlas for gaining control of the businesses of Peerless, Union and Black Diamond. The scheme involved the concealment from the stockholders of the smaller corporations of the identity of Atlas as the motivating financial interest which would ultimately control and direct the assets and affairs of the competing companies; to this end Atlas refrained from conducting direct negotiations with the smaller corporations or their stockholders (R. 129–131). Atlas desired neither to purchase the assets nor to acquire the stock of the smaller competing companies, nor did it desire to effect a merger, consolidation or reorganization as between

itself and them. The plan, as carried out, was to have a subsidiary of Atlas, organized for the purpose, acquire the stock and the assets of the competing corporation (R. 130). Atlas' entire interest in the transactions was carefully concealed, even to the extent of having it appear as a matter of record that Atlas was not a majority stockholder in the new company at the time of the stock transfers between the individual stockholders of the old companies and the two promoters, and between the promoters and the new company (R. 137–138). Whatever may have been the business advantages of keeping Atlas out of the reorganization, it is plain that Atlas and the parties considered them important and that Atlas meticulously refrained from entering the reorganization. Under such circumstances respondent hardly can claim a tax status based upon the proposition that Atlas might just as well have absorbed the smaller corporations directly.

2. The decision of the court below is in conflict with the principle applied by this Court in *Bus & Transport Corp.* v. *Helvering,* 296 U. S. 391.

In the *Bus & Transport Corp.* case, Jacobus, an individual, owned practically all the stock of two bus line corporations which will here be called A and B. Public Service [Corporation of New Jersey] desired to control A and B. Instead of directly acquiring the stock and assets of A and B, Public Service had its affiliated corporation, as agent, create a new corporation, herein called C.

Public Service's affiliate took all C's stock in exchange for 2500 shares of Public Service stock. Jacobus caused the organization of another new corporation, the taxpayer in that case, to which he transferred all his stock in A and B, acquiring all its stock in return. The taxpayer corporation then transferred the stock in A and B to Public Service's affiliate in exchange for the C stock. Thus the taxpayer corporation, through its ownership of the C stock it received in the exchange, indirectly controlled 2500 shares of Public Service stock.

The taxpayer corporation claimed that since it had exchanged property—*i. e.*, stock of A and B corporations—with Public Service's affiliate for stock of another corporation, C, which was a party to the plan, therefore the exchange constituted a reorganization and the stock of C was received without recognition of gain. There can be no doubt that C was a party to a part of the plan and to some of the exchanges carried out to effectuate the plan, yet this Court held (p. 393) that the receipt of the stock of the third corporation, C, which was not a direct party to the taxable exchange, did not give the taxpayer the "definite immediate interest" in Public Service's affiliate, the taxpayer's transferor, required by the statute to effectuate a reorganization. Accordingly, the Court stated that "Nothing here, we think even remotely resembles either merger or reorganization, as commonly

understood."[4] Standing alone, both the exchange whereby Jacobus acquired all the stock of the taxpayer in exchange for all the shares of A and B corporations, and the exchange whereby the affiliate of Public Service acquired all the stock of C in exchange for 2500 shares of Public Service stock, were, we believe, tax-free exchanges within the statutory definition of a reorganization. It follows that the basis of the decision in the *Bus & Trans. Corp.* case is that stock of a corporation other than one a party to the taxable exchange, even where such corporation is a vital part of the entire plan and intimately connected therewith, is insufficient to give to the recipient thereof the necessary definite immediate interest in the affairs of a corporation actually a party to the exchange, and hence that there is no reorganization. Applying this rule to the present case, it is clear, we submit, that Atlas, even though intimately connected with the plan and perhaps a party to other tax-free exchanges constituting a part of that plan, cannot qualify as a party to the exchange out of which the taxable transaction arose, because its stock represents only an indirect interest in and not a definite

[4] The court below used this statement to distinguish the *Bus & Transport Corp.* case (R. 206). But, plainly, if the relationship of the corporations were such as to prevent there being a reorganization, a similar relationship would prevent the instigating corporation from being a party to any reorganization which might exist with respect to other corporations.

immediate interest in the affairs of the new corporation.

It will be noted that C was just as intimately connected with the plan of the *Bus & Transport Corp.* case as was Atlas in the instant case. If stock of C did not afford the definite, immediate interest necessary to effect a statutory reorganization because it was not the corporation to whom the taxpayer transferred the property, manifestly, we think, a different result does not arise under the same language of the pertinent provisions because the third corporation is the parent of and owns an interest in one of the corporations "a party to the reorganization." The sole asset of C was stock in Public Service with which the party to the exchange was affiliated. It follows that, under the *Bus & Transport Corp.* case, the definite, immediate interest which is necessary if the transaction is to be a statutory reorganization, or a corporation a party thereto, cannot be found by tracing the inter-corporate relationships between the corporation the stock of which was exchanged and the corporation which was actually a party to the exchange.

3. The fundamental principle laid down by this Court in the construction and application of the reorganization provisions is that, for a party to an exchange to come within the exemption provisions, he or it must acquire an immediate, definite, and material interest in the assets and affairs of the other party; that this much is necessary in

order that the result accomplished may genuinely partake of the nature of merger or consolidation. *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462; *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 385; *Bus & Trans. Corp.* v. *Helvering, supra.* In the *Pinellas* case this Court approved the doctrine announced by the Circuit Court of Appeals for the Second Circuit in *Cortland Specialty Co.* v. *Commissioner,* 60 F. (2d) 937, 940, that the transactions described in the statute presuppose a continuance of interest on the part of the transferor in the properties transferred and that without this continuity of interest on the part of the transferor corporation or its stockholders there can be no exemption.

In the *Minnesota Tea* case, *supra,* this Court held that common stock of the transferee represented the definite and material interest in the affairs of the purchasing corporation required by the statute. *Nelson Co.* v. *Helvering,* 296 U. S. 374, 377, holds that preferred stock of a transferee corporation provides such an interest in its affairs. In *Helvering* v. *Watts,* 296 U. S. 387, 388, it was held that bonds of the transferor corporation, the payment of which was guaranteed by the transferee, also were securities within the definition and were not to be regarded as cash or short-term notes. But, in *Bus & Trans. Corp.* v. *Helvering, supra,* decided at the same time, this Court held that stock of a corporation not a party to the exchange did

not represent any definite, immediate interest in the affairs of the transferee and accordingly concluded that the exchange did not even remotely resemble a merger or reorganization. We submit that the principle announced by this Court in the *Pinellas* and *Minnesota Tea Co.* cases, and recognized and applied in the *Bus & Transport Corp.* case, compels the conclusion in the instant case that the stock of Atlas does not provide the continuity of interest in the affairs of the new corporation necessary to bring it within the exemption provisions, even though Atlas is unquestionably financially interested and intimately connected with the reorganization.

The Court of Appeals for the Seventh Circuit appears to be the only other court which has passed directly upon the precise question presented here. *Commissioner* v. *Groman,* 86 F. (2d) 670, now pending in this Court on writ of certiorari, No. 21, October Term, 1937, involves circumstances substantially identical with those in the instant case. The taxpayer there was a stockholder in the Metals Refining Company of Indiana, herein called Indiana. In January, 1929, The Glidden Company, an Ohio corporation, entered into an agreement with the stockholders of Indiana whereby all the stock of Indiana was to be transferred to a third company, Metals Refining Company of Ohio, herein called Ohio, which was to be formed by The Glidden Company. The consideration was to be cash,

preferred stock of Ohio, and preferred stock of Glidden, the parent company. Ohio was organized by Glidden, which paid cash for all of its common stock. Glidden received none of the preferred stock of Ohio. The exchanges were carried out as agreed. Ohio then acquired the assets and properties of Indiana, which was then dissolved. Each of Indiana's stockholders, including the taxpayer, received a proportionate amount of the cash, Ohio stock and Glidden stock. The Circuit Court of Appeals for the Seventh Circuit rejected arguments similar to those adopted by the court below and held that a parent company was not, within the meaning of the statutory definition, a party to a reorganization to which its subsidiary was a party, and hence that the receipt by the taxpayer of the Glidden stock was taxable. The court said (86 F. (2d) 670, 672):

> We see no reason for extending the meaning of the term "party" as it appears in section 112 (i) (2) (26 U. S. C. A. § 112 (g) (2) note). To hold otherwise would be to usurp legislative functions. Congress has defined a party to a reorganization so as to permit a taxpayer to avoid what would otherwise be taxable income. It could have refused to allow such deductions altogether. Having exempted "gains" through reorganization, it could and did define reorganizations. In so doing it used the term "a party" referring to those who were in the reorganization. We must hold respondent

> to the definition which Congress specifically gave to the word "party". It would, we think, be a forced construction to assume that under such circumstances there were parties other than those defined by the statute. Respondent relies upon the exemption of the statute, but declines to abide by the Congressional definition of essential terms.
>
> * * * * *
>
> Our conclusion, however, is based not upon the reasons for Congressional action, but upon the fact that Congress, in exempting gains derived through the transfer of stock which transfers are but a part of reorganizations, saw fit to define with particularity the terms "reorganization" and "parties to reorganization". As we apply these definitions to the facts before us, we are impelled to the conclusion that the Glidden preferred stock was not exempted.

The court below in *Commissioner* v. *Fifth Avenue Bank*, 84 F. (2d) 787, dealt with a similar question. There the taxpayer agreed by contract with Cyanamid to transfer his stock in Antitoxin to Cyanamid or a new corporation in exchange for non-voting common stock of Cyanamid and preferred stock of the new corporation. On the same day a wholly owned subsidiary of Cyanamid agreed to purchase the Cyanamid stock received by the taxpayer at $31 per share. The other stockholders of Antitoxin made a similar agreement and the transfers were carried out. The Board (31 B. T.

A. 945) and the court below held that this was a reorganization and that Cyanamid was a party, with the result that its stock was received without recognition of gain. It will be noted that the basic agreements were made with Cyanamid and that it could call for delivery of the Antitoxin stock to itself. Apart from the fact that no contention could be made that Cyanamid came within the literal statutory definition, since it owned none of the preferred stock of the new corporation, Cyanamid was thus rather closer to being an actual party to the reorganization than is Atlas in this case. But it must be admitted that the reasoning of the Board (31 B. T. A. at 950–952), adopted by the court with some hesitation (p. 789), would cover the present transaction as well.[5] For the reasons which we have indicated, it seems to us that the *Groman* case is the better reasoned, and that the rule of the Circuit Court of Appeals for the Third Circuit cannot be squared with the words or the purpose of the statute.

4. While this Court has recognized that the liberal purpose of the reorganization provisions is to encourage and not to penalize reorganizations and readjustment of corporate structures, it has at the

[5] The Board in two other decisions has adopted reasoning more or less similar to that of the Board and the court below in this case. *Tulsa Oxygen Co.* v. *Commissioner*, 18 B. T. A. 1283; *First National Bank of Champlain* v. *Commissioner*, 21 B. T. A. 415.

same time construed and applied these provisions strictly in accordance with the literal language of the provisions themselves. *Helvering* v. *Minnesota Tea Co., supra.* Such a rule is, of course, in accord with the well established principle that one claiming the benefit of an exemption or deductions from tax must bring himself squarely within the language relied upon. *Burnet* v. *Houston,* 283 U. S. 223, 227; *Bowers* v. *Lawyers Mortgage Co.,* 285 U. S. 182, 187. The taxpayer "must be able to point to an applicable statute and show that he comes within its terms." *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440.

A corporation in the position of Atlas is included in neither the statutory definition of "reorganization" nor in that of a "party to a reorganization." The view that its stock can qualify for the exemption granted under those provisions merely because Atlas controlled, through stock ownership, a corporation whose stock did qualify, or because it played a leading role in the instigation and completion of the reorganization, is an unwarranted extension of the statute. It follows that since Atlas is not "a party to the reorganization", the gain upon its stock is not granted exemption from recognition under Section 112 (b) (3), *infra,* but must be recognized as gain upon "other property", within the meaning of Section 112 (c) (1), *infra.*

CONCLUSION

In view of the foregoing, the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * *

(3) *Stock for Stock on Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *Same—Gain of Corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(c) *Gain from exchanges not solely in kind.*—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other prop-

erty or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(d) *Same—gain of corporation.*—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * * * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.*—As used in this section, the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 577. *Definitions.*—The term "reorganization" as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least

a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immeditately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation within the meaning of section 112, when owning—

(1) At least 80 per cent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 574 are complied with if

"stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 33

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RAYMOND I. BASHFORD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

On November 8, 1937, this Court announced its decision in *Groman* v. *Commissioner,* No. 21, October Term, 1937. On the same day the instant case, which had been argued before this Court at the same time and in connection with the *Groman* case, was set down for reargument. Though the facts of the two cases vary slightly, the two cases involve essentially the same question, i. e., whether a parent corporation may be considered a party to a statutory reorganization conceded to have been effected between its subsidiary, organized for the specific

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purpose, and another corporation.[1] The argument advanced in our original brief, we believe, is entirely consistent with the rule enunciated by this Court in the *Groman* case. It is thought, however, that a discussion of the underlying principle of the *Groman* case with relation to the facts here will be helpful, and accordingly this supplemental brief is submitted.

In the *Groman* case the Glidden Company, pursuant to contracts previously entered into, organized a new corporation, here called Ohio, for the express purpose of acquiring all of the stock and thereafter the assets of the Metals Refining Company of Indiana, herein called Indiana. The details of the plan were incorporated in a contract between Glidden and the shareholders of Indiana, wherein it was recited that the stockholders of Indiana were desirous of merging and consolidating the properties of their company with Glidden and with the new corporation, Ohio, to be organized by Glidden. The shareholders of Indiana, of whom the petitioner there was one, covenanted that they would assign their shares to Ohio, which was to have a specified capital structure divided into preferred and common shares. Glidden covenanted that it would issue and deliver or cause to be issued and delivered to the shareholders a stated number of shares of its own prior preference stock

[1] The pertinent provisions of the Revenue Act are set forth in the Appendix to petitioner's original brief, pp. 37–41.

at an agreed valuation, a stated number of shares of the preferred stock of Ohio, also at an agreed valuation and sufficient cash to equal the appraised value of Indiana's assets as of March 1, 1929, and that, after the exchange of stock, Glidden would cause Indiana to transfer its assets to Ohio.

Glidden organized Ohio and became the owner of all of its common stock, but none of its preferred stock. Pursuant to the contract, the shareholders of Indiana transferred their stock to Ohio and received therefor a total consideration consisting of Glidden prior preference stock, shares of the preferred stock of Atlas, and cash. Indiana then transferred its assets to Ohio and was dissolved.

This Court held that Glidden was not a party to the statutory reorganization effected between Indiana and Ohio either within the strict meaning of Section 112 (i) (2) of the Revenue Act of 1928, which was said not to be an all-inclusive definition, or within the ordinary connotation of the term; that the gain to the petitioner represented by the Glidden stock was not unrecognized under Section 112 (b) (3); and that, accordingly, the Glidden stock must be treated as "other property" within the purview of Section 112 (c) (1).

In the case at bar the Atlas Company, we contend, occupies a position wholly analogous to and indistinguishable in legal effect from that of Glidden in the *Groman* case, and thus the rule of the *Groman* decision requires a similar result here.

The facts of this case are set out in the original Brief for the Petitioner, pp. 2–8. To review them briefly, it is sufficient to recite that in the instant case, the Atlas Powder Company (like Glidden in the *Groman* case) conceived and executed a plan whereby its subsidiary, Peerless-Union Explosives Corporation, called the new company, was organized for the purpose of acquiring and did acquire the stock and the assets of three existing corporations called Peerless, Union, and Black Diamond. Desiring not to disclose its identity in the beginning, Atlas conducted negotiations with the majority stockholders of Peerless, Union, and Black Diamond through two agents acting as promoters of the new company. When oral agreements had been reached, Atlas was disclosed as the principal. Contracts were signed under which the agents obtained the right to acquire, on behalf of the new company, a majority of the stock of Peerless, Union, and Black Diamond in exchange for stock of the new company, stock of Atlas, and cash, to be delivered to the stockholders of the old companies. The agents warranted that the new company would acquire all the assets of the three old companies and that the old companies would then be dissolved.

The new company was duly organized by Atlas pursuant to the agreements. Atlas subscribed to all of its original issue of common and preferred stock, which was all issued to Atlas.

On October 2, 1930, a special meeting of the Board of Directors of Atlas was held and upon motions duly adopted the actions of its exeeutive officers in causing the formation of the new company for the purpose of acquiring the assets and business of Peerless, Union, and Black Diamond, and the plan of reorganization, were approved. The officers of Atlas were empowered and directed to invest in the capital stock of the new company up to a specified aggregate, and in consideration therefor to deliver to the new company cash, shares of Atlas preferred stock and shares of Atlas common stock in substantial amounts.

All of the transfers and exchanges were made pursuant to the agreements, the assets of the three old companies were transferred to the new company and the old companies were dissolved. Upon completion of the stock exchanges on October 7, 1930, and after the issuance of additional stock by the new company, Atlas owned 100 per cent of the preferred stock of the new company and approximately 57 per cent of its common stock, and the former stockholders of Peerless and Union owned approximately 43 per cent of the common stock of the new company. (R. 49–56, 129–133.)

From the foregoing, we submit that the transactions in the instant case and the *Groman* case are in all essential respects the same. We believe that there can be pointed out but two distinctions between the plan adopted by Glidden in the *Groman*

case and that by Atlas in this case, and that these differences have no legal significance and are insufficient to require different results under the same provisions of the Revenue Act of 1928.

The first distinction is in the methods adopted by the parent corporations in their dealings with the stockholders of the corporations of which they desired to obtain control. In the *Groman* case, Glidden was a direct party to the contract whereby the shareholders of Indiana agreed to transfer their stock to Ohio. Here, on the other hand, Atlas was not a party to the principal contract setting forth the plan of the exchanges because Atlas remained undisclosed while its agents opened the negotiations. Atlas' rights were derived through the contracts of its agents. It is true that under these contracts the agents of Atlas had the right to receive the stock of the old companies but plainly the right itself was restricted to their agency to receive it for the new corporation.

The main features of the plan, as shown by the unchallenged findings of the Board, "were that Peerless, Union and Black Diamond *were to be consolidated into the new company,* Peerless-Union Explosives Corporation, that the stockholders of the old companies would receive for their stock in the old companies stock in the new company, stock in Atlas and some cash" (R. 130–131). [Italics added.] Further, Atlas' agents were instructed that Atlas did not desire to purchase "either the

assets or stocks of Peerless, Union or Black Diamond, but to reorganize them into a new company by the exchange of stocks, which new company would be controlled by Atlas" (R. 130). Thus, while the negotiators may have been agents of Atlas with respect to the general transaction, they could not have been agents who were acquiring the stock for Atlas. Also, it appears from the testimony of the president of Atlas that "in effecting the plan, it was made known to each of the stockholders of Peerless and Union that their participation in these exchanges was based upon all various steps being consummated up to the conclusion of the plan which took place on October 7th; that the stockholders of the so-called majority group of both the Peerless and the Union agreed to deposit their stock and agreed to go through with certain agreements *provided the whole plan was consummated;* * * *" (R. 158). [Italics added.]

If, upon the basis of these facts, it should be argued by the respondent that Atlas through its agents in effect acquired "at least a majority of the voting stock" and of the total number of shares of other classes of stock of the old corporations and thus complied with the statutory language of Section 112 (i) (1) (A), we believe that such argument would be overcome by the indisputable fact that Atlas, through its agents, received such stock for the sole and express purpose of immediately

passing it on to the new company. In other words, it appears that the Atlas agents at the most were nothing more than conduits through which the subsidiary acquired the stock of the old companies. In the words of Atlas' president (R. 158), "participation in these exchanges was based upon all various steps being consummated" in accordance with the plan and agreements. All of the transfers and exchanges were contracted for and made on the same day—October 7, 1930 (R. 26, 27, 28, 29, 136). At best, the acquisition of and possession by the agents of Atlas of the stock of the old companies were fleeting and transitory. It is settled that such an intermediate transfer does not constitute an "acquisition" within the meaning of the statutory definition of a reorganization (*Bassick* v. *Commissioner,* 85 F. (2d) 8, 10 (C. C. A. 2d), certiorari denied, 299 U. S. 592, rehearing denied, 299 U. S. 623); also, that such intermediate transfers may not be regarded as separate and distinct transactions (*Starr* v. *Commissioner,* 82 F. (2d) 964, 967, 968 (C. C. A. 4th), certiorari denied, 298 U. S. 680). Even if such a transfer can be regarded as an acquisition in form by Atlas' agents, obviously it was not "the thing which the statute intended." *Gregory* v. *Helvering,* 293 U. S. 465, 469. Moreover, to treat the transfer as an acquisition by Atlas would plainly disregard the "main features" of the plan as agreed to and carried out (R. 130–131). Thus, in fact and in law, we think there is no

room for the contention that Atlas, through its agents, "acquired" the stock of the old companies and thus effected a compliance with the statutory definition.

The second distinction in the facts of the two cases is found in the circumstance that, at the consummation of the transactions, Atlas (unlike Glidden) held a majority of both the preferred and common stock of its subsidiary. Section 112 (i) (2) provides that the term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.[2] In the instant case it is conceded that there was a reorganization between the old companies, Peerless, Union, and Black Diamond, and the new company. It cannot be denied that Atlas acquired a majority of the voting and all other classes of the new company's stock.

We believe that the acquisition by Atlas of a majority of the voting and all other classes of stock of

[2] In the opinion of the *Groman* case (page 3) it was said that if Section 112 (i) (2) is an exclusive definition of a party to a reorganization, which it was there held not to be, Glidden was not within its terms for it was not a corporation resulting from the reorganization and "it did not acquire a majority of the shares of the voting stock and a majority of the shares of all other classes of stock of *any other corporation in the reorganization.*" (Italics added.)

the new company does not render Atlas a party to the conceded reorganization between the new company and the three old companies. The taxpayer was a stockholder of Peerless. The question is whether the stock of Atlas he has received in the Peerless reorganization is to be recognized. Atlas' tax liability growing out of its part in these transactions is not involved. We have developed at pages 15–17 of our original brief in this case our contention that Atlas is not a party to the reorganization between the old companies and the new because of its acquisition of the new company's stock, and we believe the *Groman* decision has not lessened the effect of that argument.

Thus, Atlas did acquire a majority of the stock of "another corporation." Under Section 112 (i) (2) this may have made it a party to a reorganization between Atlas and the new company. It could not serve to make it a party to a reorganization of corporations the stock of which was not acquired by Atlas. We believe that to cause Atlas to be a party to the reorganization in question because it acquired a majority of the voting and all other classes of stock of another corporation, it must be shown that the stock of the corporation asserted to be a party (here, Atlas) represents the continuity of interest required by the reorganization provisions under the *Groman* and other decisions of this Court.[3]

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[3] *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 385, and related cases.

The mere fact that a parent corporation is intimately connected with a reorganization plan, and perhaps a party to other tax free exchanges constituting a part of that plan, can not alone qualify it as a party to the exchange out of which the taxable transaction arose. This is true in this case because the Atlas stock, like that transferred in *Bus & Transport Corp.* v. *Helvering,* 296 U. S. 391, represents only an indirect interest, and not a definite and material interest, in the assets and affairs of the subsidiary corporation. See petitioner's original brief, pp. 26–29; *Groman* v. *Commissioner, supra.*

The underlying principle of the decision in the *Groman* case we believe is found in the statement of the Court (Opinion, p. 6) that a compliance with the purpose of the reorganization sections is had only "where, pursuant to a plan, the interest of the stockholders of a corporation continues to be definitely represented in substantial measure in a new or different one, then to the extent, but only to the extent, of that continuity of interest, the exchange is to be treated as one not giving rise to present gain or loss."

We submit that this rule, applied to the facts of the instant case, requires the conclusion that the stock of Atlas no more represents a definite, material, and substantial interest in the transferred assets than did the stock of Glidden in the *Groman* case. The Atlas stock carried no proprietary inter-

est in the assets of the new company, for such an interest could be obtained only through the stock of the new company itself which held the transferred assets of the old companies. Not only does Atlas' stock carry but an indirect interest in the assets of the old companies, but it represents an entirely new and distinct interest. This is so because Atlas' stock carried an interest only in the assets of Atlas, a part of which, it is true, was the common and preferred stock of the new company. But this is not the immediate and direct interest required by the statute. *Bus & Transport Corp.* v. *Helvering,* 296 U. S. 391, 392.

Failing the crucial test of continuity of interest in the transferred assets, Atlas did not become a party to the reorganization between its subsidiary and the old companies by reason of its participation in carrying out such reorganization. Nor does the difference in degree of its stock control over its subsidiary, as compared with that of Glidden over its subsidiary, supply the continuity of interest required by the statute. To reject the plain meaning of the term "party" and to attribute that relation to Atlas, would be not only to disregard the letter but also to violate the spirit of the Revenue Act.

Consequently, Atlas may not be regarded as a party to the reorganiaztion and the gain upon its

stock must be recognized under the express language of Section 112 (c) (1).

Respectfully submitted.

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DECEMBER 1937.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

RAYMOND I. BASHFORD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 916.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

RAYMOND I. BASHFORD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The Opinion of the Board of Tax Appeals (R. 127-143) is reported in 33 B. T. A. 10. The unanimous Opinion of the United States Circuit Court of Appeals for the Third Circuit affirming the decision of the Board of Tax Appeals is reported in 87 F. (2d) 827.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 22, 1937. Petition for a Writ of Certiorari was filed April 22, 1937. The jurisdiction of this Court is

invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

The taxpayer, an individual, owned stock in A corporation. C corporation desiring to acquire control of the assets and business of A, and certain other corporations, developed and financed a plan which admittedly resulted in the reorganization of A, and said other corporations, into a new corporation B, organized for the purpose by C. The reorganization was consummated through exchanges with stockholders of A, and said other corporations, in which they received stock of B, stock of C and cash. Through consummation of and as a part of the plan from its inception, C acquired all the preferred stock and a majority of the common stock of B (the same being the only classes of its stock). The question is whether the gain represented by the C stock is taxable, which depends upon whether it is stock of a corporation, a party to the reorganization, under Section 112(b)(3), or "other property" under Section 112(c)(1), Revenue Act of 1928. The taxpayer conceded the taxability of the cash and the Commissioner has conceded that no gain shall be recognized on the receipt by taxpayer of stock of B.

Statute and Regulations Involved.

The statute and regulations involved will be found in the Appendix, *infra*, pp. 15-17.

Statement.

The facts, except those disclosed by the testimony of two witnesses, were stipulated before the Board of Tax Appeals (R. 19-126). The findings of fact made by the Board were included in its Opinion (R. 127-143) and may be summarized as follows:

Prior to October 7, 1930, Peerless Explosives Company, Union Explosives Company and the latter's wholly owned subsidiary, Black Diamond Powder Company, were corporations engaged in the manufacture and sale of explosives, as was Atlas Powder Company. Atlas was not satisfied with its position of rivalry with the other three corporations who were not only competitors but substantial customers of Atlas, since they purchased from it large quantities of chemicals used in the manufacture of their products. Desiring to acquire control of the business of these companies, the President of Atlas, early in 1930, conceived the plan of attaining this end by means of reorganizing the three competitive companies into a new corporation to be controlled by Atlas. In order that the plan might not be blocked prematurely by competitive interests and to insure reasonable terms (R. 186—Statement of Evidence) Atlas concealed its identity at the inception of the negotiations by acting through individual agents (R. 129-130) but its identity was disclosed in July, 1930 (R. 186—Statement of Evidence), when the majority stockholders of Peerless and Union gave their oral assurance that they would exchange their stock on the basis of a plan substantially like the written contracts finally entered into on October 7, 1930 (R. 130). From the beginning, however, the said agents made it plain that they represented a strong financial interest which would finance the reorganization and that said agents and the principal stockholders of Peerless and Union would be officers in the new company (R. 130).

The main features of the reorganization plan were that Peerless, Union and Black Diamond were to be consolidated into a new company, Peerless-Union Explosives Company; that the stockholders of the old companies would receive for their stock, Atlas stock, stock in the new company and cash. Atlas on its part was to furnish the new company with sufficient cash and sufficient shares of its own common and preferred stock to complete the transaction in exchange

for the preferred stock and a majority of the common stock of the new company (R. 130-131). As a preliminary step, Atlas caused the incorporation of the new company, September 22, 1930, for the purpose of acquiring the business and assets of Peerless, Union and Black Diamond, and subscribed for and was issued all of its original authorized capital stock, the same being 10 shares of common and 10 shares of preferred. Subsequently, on October 6, 1930, the capital stock of the new company was increased to 100,000 shares of common of no par value and 50,000 shares of preferred of $100 par value (R. 131).

On October 2, 1930, the Board of Directors of Atlas approved the proposed reorganization and the incorporation of the new company and authorized its officers to pay over to the new company sufficient of its stock to carry out the plan, *i. e.* 6,318 shares of Atlas preferred stock, 8712½ shares of Atlas common stock and $960,560.25 in cash in exchange for shares in the new company (R. 131-132).

On October 7, 1930, the majority stockholders of Peerless and Union entered into written contracts with the agents of Atlas to deliver the former's shares of stock in their respective corporations in exchange for cash, shares of common stock in the new company and shares of stock in Atlas, as provided for in the plan. The contracts also provided a basis of exchange with the minority stockholders (R. 132-133). Pursuant to the plan the agents of Atlas on the same day entered into a written contract with the new company in which the agents agreed to exchange the stock of Peerless and Union, to which they were entitled under their contracts with the stockholders of Peerless and Union, for cash, stock of Atlas and stock of the new company in the amounts required by the agents to consummate the exchanges under their contract with the stockholders of Peerless and Union. There were warranties relative to the employment of stockholders of the old companies by the new, to the dissolution of the old companies and the acquisition by the new company of their assets and

the assumption of their liabilities, and to the reimbursement by *Atlas* to said stockholders for any income tax imposed upon them growing out of this transaction (R. 135).

Prior to October 7, 1930, the agents of Atlas had secured options on practically all of the minority stockholdings in Peerless and Union on the terms stated in the contracts above mentioned. On October 7, 1930, the transfers and exchanges were made pursuant to the agreements and reorganization plans. The old companies transferred their assets to the new company and were dissolved, with the result that the new company became the owner of practically all of the stock and all of the assets of the old companies and Atlas received all of the preferred stock and over 57 per cent of the common stock issued by the new company. The stockholders of the old companies received 43 per cent of the common stock of the new company and a substantial block of common and preferred stock in Atlas (R. 135-136). The taxpayer, one of the majority stockholders of Peerless, received in exchange for his stock in that company 2720.08 shares of the common stock of the new company, 625 shares of preferred stock of Atlas, 1344 shares of the common stock of Atlas and $25,306.67 in cash (R. 138).

The Commissioner asserted a deficiency against the taxpayer (R. 12-14) upon the theory that there had been a statutory reorganization effected between the three old companies and the new company but that Atlas was not a party to such reorganization and, therefore, its stock received by taxpayer in the exchange should be treated as "other property" and the gain thereon recognized along with the cash received under Section 112(c)(1), Revenue Act of 1928, infra, p. 15.

The Board of Tax Appeals rejected the contentions of the Commissioner and held that a statutory reorganization was effected between the three old companies and the new corporation and that Atlas was unquestionably a party thereto by reason of the fact that it acquired all the pre-

ferred stock and a majority of the common stock of the new company, in the transaction in which the Board found that without the participation of Atlas there would have been no reorganization (R. 141).

While the Board found that the facts in the instant case were in some respects similar to those in *Fifth Avenue Bank of New York, Executor*, 31 B. T. A. 945, affirmed, 84 F. (2d) 787, in that Atlas was found to be the main spring of the entire proceeding, yet it held that the facts in the instant case are even stronger for the taxpayer than in that case, in that Atlas came within the literal terms of Section 112(i)(2), citing in support *Tulsa Oxygen Co.*, 18 B. T. A. 1283; *First National Bank of Champlain, N. Y.*, 21 B. T. A. 415 (R. 141-142).

In the Circuit Court of Appeals the Commissioner conceded that a statutory reorganization had been effected between the new corporation and the three old companies, but contended that Atlas was not a party to the reorganization because it was not so intimately connected therewith as to become a party to a reorganization within the meaning of Section 112(i)(2), Revenue Act of 1928 (R. 203-204); that the instant case was controlled by the decision of this Court in *Bus & Transport Securities Corp.* v. *Helvering*, 296 U. S. 391 (R. 206), because Atlas had employed a circuitous and involved scheme for gaining control of the businesses of the old corporations through the use of agents who, during the preliminary negotiations with the stockholders, did not disclose the identity of Atlas. The Commissioner further contended that despite the fact Atlas acquired a majority of the stock of the new company, it was not a party *in fact* to the reorganization since its relation to the reorganization was indirect, separate and distinct (Pet. Br. below, pp. 2, 15-26).

The Court below held that Atlas was a party to the reorganization within the literal terms of the statutory definition because Atlas had acquired a majority of the stock of all classes of the new company, in connection with the con-

solidation of the three old companies under the plan of reorganization and by way of *dictum* said that even if Atlas had not come within the literal terms of the statutory definition, it was a party to the reorganization because Atlas was so intimately connected with the reorganization of the other corporations (R. 205). The Court held that a contrary conclusion was not justified by the opinion in the *Bus & Transport Securities Corp.* case, since that case was clearly distinguishable on its facts, there being, as stated by this Court, no transaction involved which "we think, even remotely resembles either merger or reorganization, as commonly understood". (R. 206)

Argument.

The Petitioner urges two reasons for granting the writ: *first*, that the case involves an important question of Federal law, under the reorganization provisions of the Revenue Acts, which has not, but should be settled by this Court, and, *second*, that the decision of the Court below is squarely in conflict with the decision of the Seventh Circuit Court of Appeals in *Commissioner* v. *Groman*, 86 F. (2d) 670, in which a petition for certiorari, filed by the taxpayer, is now pending in this Court, No. 854, October Term, 1936.

Respondent opposes the granting of the writ for the following reasons:

First, because the point of Federal law here in question was not raised prior to the petition for certiorari.

Second, because the Petitioner has not established a question of Federal law, since the construction of the statute in question, by the Court below, has not been challenged by applicable judicial decision. As the language of the statute is clear and unambiguous and as its construction by the Court below is in accordance with long established decisions of the Board of Tax Appeals and the regulations of

the Treasury Department in force since 1924, there is nothing for this Court to construe.

Third, because the decision of the Court in the instant case is not in conflict with the decision of the Seventh Circuit Court of Appeals in *Commissioner* v. *Groman, supra.*

1. In the petition for certiorari, the Commissioner for the first time raises the statutory question whether the stock of Atlas carries with it the necessary continuity of interest in the assets and affairs of the new company so that the gain thereon is unrecognized under Section 112(b)(3) despite the conceded fact that Atlas acquired the majority of the stock of all classes of the new company in accordance with the literal terms of Section 112(i)(2), Revenue Act of 1928, in connection with the admitted reorganization of the old companies into the new company.

In the deficiency letter, the Commissioner took the position that there was a reorganization between the old and the new companies, but that the value of the Atlas stock was taxable income under the provisions of Section 112(c)(1). (R. 12-14) Before the Board, the Commissioner changed his position and contended that by none of the exchanges was a statutory reorganization effected; that the entire transaction constituted a sale; and that even if it were conceded that a statutory reorganization was effected between the old companies and the new that Atlas was not a party since it failed to acquire a majority of the stock of all classes of the new company and thus qualify under the literal terms of Section 112(i)(2). (R. 139, 203)

Defeated on these *questions of fact,* the Commissioner appealed to the Court below on the theory that although there admittedly was a statutory reorganization between the old companies and the new company, and even may have been a reorganization between Atlas and the new company, yet, because of the circuitous and involved method employed by Atlas for gaining this control of the old companies, Atlas was not a party *in fact* to the reor-

ganization wherein the taxpayer acquired stock in Atlas. This alleged devious method was likened by the Commissioner to the transactions involved in the *Bus and Transport Securities Corp.* case (R. 204—Pet. Br. below, pp. 2, 15-26). Thus, in another form the Commissioner raised the largely *factual question* whether Atlas, by contract or otherwise, was a party to the transactions which he now concedes constitute a statutory reorganization or whether Atlas employed such a circuitous and devious scheme, acting through agents whose identity was not disclosed in the preliminary negotiations, that it occupied a position essentially different from that occupied by the parent corporation in the *Fifth Avenue Bank* case and comparable with the facts in the *Bus and Transport Securities Corp.* case (Pet. Br. below, p. 25).

Now, having failed to convince the Circuit Court that there was a similarity of method employed in the instant case and in the *Bus and Transport Securities Corp.* case sufficient to disqualify Atlas as a party to the reorganization, the Commissioner for the first time seeks to raise in his petition for certiorari, the issue whether Atlas, being merely the parent company of the transferee of Peerless, could under *any* circumstances as to *method* of carrying out this plan of reorganization, have become a party to the reorganization within the meaning of Section 112(i)(2).

In *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, at 380, in connection with a point of statutory construction raised for the first time in the petition for certiorari, this Court in refusing to consider it, said:

> "This point was not raised prior to the petition for certiorari, and under the circumstances, we do not consider it."

It is respectfully submitted that in the same circumstances here, the petition for certiorari on this point should be denied.

2. The petition for certiorari has failed to establish the existence of "an important question of Federal law".

The Commissioner contends that the Court below adopts an erroneous construction of Section 112(i)(2) when it applies the statute in accordance with its plain and ordinary meaning. While admitting that the acquisition by Atlas of a majority of the stock of the new company comes within the *literal* terms of the statute, he asks this Court to adopt an unnatural and forced construction of its language which is in conflict with his long established regulations and the uniform rulings of the Board of Tax Appeals.

While not directly urging that the construction of the statute by the Court below is in conflict with the applicable regulations of the Treasury Department (Article 577, Regulations 74) Petitioner seeks to avoid the necessary implications of its language by stating that neither Section 112 (i)(2) or Article 577, Regulations 74 "provide that a parent corporation is to be considered a party to a reorganization to which its subsidiary is a party". This argument is without substance for it is elemental that the statute must be taken to mean what it says. See *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, at 199. This doctrine applies with special force to tax statutes. See *Crooks* v. *Harrelson*, 282 U. S. 55, at 61. The words being clear they are decisive. There is nothing to construe. See *Van Camp & Sons* v. *Am. Can Co.*, 278 U. S. 245.

The necessary implication of Petitioner's argument is that Section 112(i)(1)(A), defining reorganization, modifies the evident meaning of Section 112(i)(2). This theory that one section of a reorganization statute should be construed to modify another section was repudiated by this Court's decision in *Helvering* v. *Minnesota Tea Co., supra*, at page 384.

Nor has Petitioner shown that the decisions cited support a view contrary to that taken by the Court below. In *Bus and Transport Securities Corp.* v. *Helvering, supra*, this Court had no reason to construe Section 112(i)(2)

since Public Service Company of New Jersey, the parent corporation, could not be "a party to a reorganization" if, as this Court stated, none of the transactions even remotely resemble a reorganization.

Both in the *Minnesota Tea* case and in *Cortland Specialty Co.* v. *Commissioner*, 60 F. (2d) 937, certiorari denied, 288 U. S. 599, the sole question was whether the transaction in question constituted a merger or reorganization under Section 112(i)(1)(A). In the former case an exchange of the assets of the Minnesota Tea Company for a small percentage of the stock of Grand-Union was held to be a reorganization. In the latter case, the Court held that there was no semblance of a merger or reorganization since cash and short-time notes did not represent a continuity of interest in the assets transferred. Similarly in *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462, this Court held that the sale of assets for money and short-time notes was not within the intendment of Section 112(i)(1)(A). In none of these cases was the Court called upon to construe Section 112(i)(2).

If the literal terms of Section 112(i)(2) cannot be held conclusive as to its meaning, a reference to its long established construction by the Commissioner leaves no support to Petitioner's contention. The identical language of this Section and Article 577 of Regulations 74, promulgated thereunder, is found in the Revenue Acts of 1924 and 1926 and the regulations promulgated thereunder. In re-enacting the statute Congress has expressed its approval of the construction contained in the prior regulations. See *Helvering* v. *Minnesota Tea Co., supra*, at 384; *Helvering* v. *Watts*, 296 U. S. 387. The construction of the statute by the Court below is clearly in accordance with Article 577 of Regulations 74. (R. 205) The Board of Tax Appeals has uniformly applied and construed the statute in accordance with these regulations of the Treasury Department. See *Claude Neon Lights, Inc.*, 35 B. T. A., No. 63, at 10; *John S. Woodard*, 30 B. T. A. 1216, at 1223-24; *Fifth Avenue Bank*, 31

B. T. A. 945, at 951; *First National Bank of Champlain*, 21 B. T. A. 415. The facts in the *First National Bank of Champlain case*, in which the Government did not appeal from the decision of the Board, are very similar to those in the instant case and involve a similar construction of the statute.

The decision of the Seventh Circuit Court in *Commissioner* v. *Groman, supra*, which Petitioner cites as being squarely in conflict with the decision in the instant case will be shown, by the discussion under the third sub-division of this argument, not to involve the alleged question of Federal law raised by Petitioner herein. It should be observed that although the Petitioner contends that a question of Federal law is raised by the decision of the Court below the Commissioner did not petition for a writ of certiorari in the recent *Fifth Avenue Bank* case involving the identical question raised in the *Groman* case.

3. The contention of Petitioner that the instant case is squarely in conflict with the decision in the *Groman* case is based upon his erroneous conclusion that the Board and the Court below in the instant case based its decision that Atlas is a party to the reorganization upon the fact that Atlas was intimately associated with and the motivating force in the consummation of the plan of reorganization of the old and the new companies, under the doctrine of the *Fifth Avenue Bank* case (Pet. Br. below 24-25). This error lead Petitioner, in this Court, to the further error that the instant case is in conflict with the *Groman* case which is the exact converse of the decision in *Fifth Avenue Bank*, supra.

In the Court below Petitioner strenuously argued that the instant case was *essentially different from the Fifth Avenue Bank* case (Pet. Br. below 24-26). It is not strange, therefore, that no mention of that case is made in the petition for certiorari.

Since in neither the *Fifth Avenue Bank* or *Groman* cases was it even contended that the parent corporation came

within the *literal terms* of the statute, it was necessary for the Court to find that its terms could and should be extended to the facts there involved. In the *Fifth Avenue Bank* case, Cynamid, the parent corporation, acquired all the common stock and none of the preferred stock of the new company, while in the *Groman* case, Glidden Company, purchased the common stock in the new company for cash and received none of the preferred stock. Atlas, on the other hand, received 57% of the common stock of the new company and all of its preferred stock. Both as to the law and facts, the decision of the Third Circuit Court of Appeals in the *Fifth Avenue Bank* case, was cited as being precisely in point with the *Groman* case in the petition for certiorari (page 3) filed by the taxpayer in *Herman C. Groman* v. *Commissioner*, No. 854, now pending in this Court.

The Board of Tax Appeals and the Court below, in the instant case, both held that the acquisition by Atlas of a majority of the stock of the new company, within the literal terms of the statute, constituted a controlling difference between the facts in the instant case and the *Fifth Avenue Bank* case.

The Board in its Opinion found that:

> "The facts in this case are even stronger for the Petitioner than those in the above cited case in support of the proposition that Atlas was a 'party to a reorganization' for here the evidence shows that Atlas acquired all of the preferred stock of the new company and 57 per cent of the common stock which unquestionably made it a party to the reorganization." (R. 142)

The Court below in affirming the Board said:

> "We also observe that the reorganization in this case contemplated and involved not only the acquisition by the new company of a majority of the stock of all classes of the old companies, but also the acquisition by Atlas of a majority of the stock of all classes of the

new company itself. It, therefore, appears that Atlas was a party to the reorganization within the literal terms of the statutory definition." (R. 205)

Unnecessary to the decision of the Court below and purely by way of dictum it made the following comment, "But even if this were not so, we are satisfied that Atlas was a party to the reorganization within the meaning of the statute * * *."

The dictum of the Court was occasioned by the contention of Respondent that even in the event it was found that Atlas had not acquired a majority of the stock of the new company, Atlas would qualify as a party to the reorganization under the doctrine of the *Fifth Avenue Bank* case. Therefore, the decision in the *Groman* case is in conflict only with the dictum in the decision of the Court below in the instant case. It is submitted that this is not such a conflict as would warrant this Court in granting a writ of certiorari.

Conclusion.

It is submitted that the decision below is correct. The Petitioner has raised no question of Federal law which should be considered by this Court. As the decision of the Court below is not in conflict with the decision of another Circuit Court Court of Appeals, the petition should be denied.

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APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 112. RECOGNITION OF GAIN OR LOSS:

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * * * *

(3) *Stock for stock on reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *Same—Gain of corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * * * *

(c) *Gain from exchanges not solely in kind.*—(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(d) *Same—gain of corporation.*—If an exchange would be within the provisions of subsection (b)(4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * * * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.*—

* * * * * * *

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 577. *Definitions.*—The term "reorganization" as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

* * * * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 33

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

RAYMOND I. BASHFORD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

WALTER G. MOYLE,
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OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals (R. 127-143) is reported in 33 B. T. A. 10. The opinion of the Circuit Court of Appeals (R. 202-206) is reported in 87 Fed. (2d) 827.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 22, 1937 (R. 206). The petition for writ of certiorari was filed April 22, 1937, and was granted May 24, 1937 (R. 208). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Taxpayer, an individual, owned stock in Corporation A (Peerless). Corporation C (Atlas) desired to obtain control of the business and assets of A and of its wholly owned subsidiary (Black Diamond), and of another corporation, B (Union), all four corporations being engaged in the same line of business. Pursuant to agreements between C on the one part and owners of substantially all of the stock of A (including taxpayer) and of B on the other part, a plan of reorganization, conceived by C, was consummated. In accordance with said agreements C acquired from the stockholders of A and B substantially all of the stock of these corporations in exchange for a substantial amount of its own stock, cash and approximately 43 per cent of the common stock of a new corporation, D (Peerless-Union), which C organized pursuant to the plan. C, as a part of the plan, delivered to D, the stock of A and B which, after a transfer of all their assets to D, were dissolved. Through consummation of and as a part of the plan from its inception, C acquired all the preferred stock and approximately 57 per cent of the common stock of D, the same being the only classes of D's stock.

Petitioner has conceded that the consummation of the plan resulted in a statutory reorganization to which D was a party and hence that the gain, if any, to taxpayer realized through his acquisition of the stock of D is non-taxable. Taxpayer paid the tax upon the gain realized through his acquisition of cash. The sole remaining question is whether the

gain resulting from the acquisition by taxpayer of stock in C is taxable. This depends upon whether the stock of C is stock of a corporation, "a party to the reorganization" under Section 112 (b) (3), or "other property" under Section 112 (c) (1) of the Revenue Act of 1928.

STATUTE AND REGULATIONS INVOLVED.

The statute and regulations involved will be found in the Appendix, *infra*, pp. 37-40.

STATEMENT.

The facts in this case, except those disclosed by the uncontradicted testimony of two witnesses, were stipulated before the Board of Tax Appeals (R. 19-37). Attached to and made a part of the stipulation as exhibits (R. 37-126) are the several documents and agreements referred to herein. Separate findings of fact were not made by the Board. Its findings of fact were included in its Opinion (R. 127-143) and may be summarized as follows:

Prior to October 7, 1930, Peerless Explosives Company, Black Diamond Powder Company, its wholly owned subsidiary, and Union Explosives Company were corporations engaged in the manufacture and sale of explosives, as was Atlas Powder Company. Peerless and Union were not only competitors of Atlas but also substantial customers of that Company since they purchased from it large quantities of chemicals used in the manufacture of their products. (R. 128-129)

The President of Atlas, not satisfied with its relationship with Peerless and Union, conceived the plan of acquiring control of the business of these companies by means of reorganizing them into a new corporation to be controlled by Atlas (R. 129).

In order that the plan might not be blocked prematurely by competitive interests and to assure reasonable terms not otherwise obtainable (R. 129, 186) Atlas acted through in-

dividual agents, Seligman and Fletcher, both being experienced in the powder business through former connection with Atlas and both being personally acquainted with many of the stockholders of Peerless and Union (R. 129-130). Atlas instructed its agents that it did not desire to purchase either the assets or stock of Peerless or Union but to reorganize them by exchanges of stock into a new company which would be controlled by Atlas (R. 130).

For the same reasons that it acted through agents, Atlas did not disclose its identity at the inception of the negotiations (R. 129, 186). During the preliminary negotiations with the majority stockholders, however, Atlas' agents let it be known that they represented a strong financial interest which would finance the reorganization and that the principal stockholders of Peerless and Union would become stockholders and officers of the new company (R. 130). The identity of Atlas was disclosed in July, 1930 (R. 186, 195) when the majority stockholders of Peerless and Union gave their oral assurance that they would exchange their stock on the basis of a plan substantially similar to that consummated under the written contracts entered into on October 7, 1930 (R. 130).

The main features of the reorganization plan were that Peerless (with Black Diamond) and Union were to be consolidated into a new company, Peerless-Union Explosives Company; that the stockholders of the old companies would receive for their stock, cash, Atlas stock and stock of the new company. Atlas in exchange for the preferred stock and a majority of the common stock of the new company, on its part, was to furnish the new company with working capital and with sufficient cash and shares of its own common and preferred stock to complete the exchanges with the stockholders of the old companies. (R. 130-131)

As a preliminary step, Atlas caused the incorporation of the new company on September 22, 1930, for the purpose of acquiring the business and assets of Peerless, Black Diamond and Union, and subscribed for and was issued all of

its original authorized capital stock, the same being 10 shares of common and 10 shares of preferred. Subsequently, on October 6, 1930, the authorized capital stock of the new company was increased to 100,000 shares of common stock of no par value and 50,000 shares of preferred stock of $100 par value. (R. 131)

On October 2, 1930, the Board of Directors of Atlas approved the proposed reorganization and the incorporation of the new company and authorized and directed its officers to invest in the capital stock of the new company up to an aggregate of 21,732 shares of its preferred stock and 32,198 shares of its common stock, and in consideration therefor to deliver to the new company $960,560.25 in cash, 6318 shares of Atlas preferred stock on the basis of $100 per share, and 8,712½ shares of Atlas common stock on a basis of $66.66-2/3 per share (R. 131-132). At the same time Atlas authorized and empowered its transfer agent to make such original issue of the shares of its stock as, with available treasury stock to be devoted to the purpose, would enable Atlas to fulfill its obligations under the plan in connection with the transfer of its stock (R. 43). Atlas' investment, as authorized, was consummated on or about October 7, 1930 (R. 136).

On October 7, 1930, the Respondent taxpayer, one of the majority stockholders of Peerless, and the other majority stockholders of Peerless and of Union, entered into written contracts with the agents of Atlas to deliver their shares of stock in their respective corporations to said agents in exchange for cash, shares of common stock in the new company and common and preferred shares of stock in Atlas in amounts agreed on in the plan (R. 132-134). The contracts provided a basis of exchange with the minority stockholders (R. 133, 134-135), and also certain warranties as to the employment of said majority stockholders by the new company, as to the acquisition by the new company of the assets of the old companies and the assumption of their liabilities, and their dissolution (R. 133-135).

On the same day the agents of Atlas and the new company entered into a written contract wherein the agents agreed to exchange the stock of Peerless and Union, to which they were entitled under their contracts with the stockholders of those corporations, for cash, stock of Atlas and stock of the new company in the amounts required by the agents to consummate the exchanges under their contracts with the said stockholders (R. 135). In addition Atlas agreed, in individual agreements with said majority stockholders, to reimburse them for any income tax resulting from the recognition of gain derived either from the receipt of Atlas stock therein or upon the subsequent sale of said stock (R. 135). Prior to October 7, 1930, the agents of Atlas had secured options on practically all of the minority stockholdings in Peerless and Union (R. 135-136).

On October 7, 1930, all of the transfers and exchanges provided for in the above-mentioned agreements and the plan of reorganization were made. As a result of the consummation of the agreement between the agents of Atlas and the new company, the latter became the owner of practically all of the stock of Peerless and Union. The old companies then transferred their assets to the new company and were dissolved (R. 136).

Upon completion of the stock exchanges on October 7, 1930, the shareholdings in the new company were as follows (R. 136):

	Shares	Shares	Percentage of total
Preferred stock	21,732	.....	
Owned by Atlas.....	.....	21,732	100%
Common stock	64,252.54	.....	
Owned by Atlas.....	.....	37,198	57% plus
Owned by former stockholders of Peerless and Union.....	27,054.54	.....	43% minus

The taxpayer, one of the majority stockholders of Peerless, received in exchange for 2534.38 shares of the common

stock of that company, the following: $25,306.67 in cash; 625 shares of the preferred and 1344 shares of the common stock of Atlas, and 2720.08 shares of the common stock of the new company (R. 138). Taxpayer included all of the cash received as taxable income in his return for the year 1930 claiming no cost or other basis for his stock in Peerless (Ex. "R").

The Commissioner asserted a deficiency against the taxpayer upon the theory that there had been a statutory reorganization effected between the three old companies and the new company but that Atlas was not a party to such reorganization and that, therefore, its stock received by the taxpayer in the exchange should be treated as "other property" and the gain thereon recognized along with the cash received under the provisions of Section 112 (c) (1) of the Revenue Act of 1928 (R. 12-13).

Before the Board, the Commissioner changed his position and claimed that no statutory reorganization was effected, but that the entire transaction constituted a sale (R. 139).

The Board of Tax Appeals rejected the contentions of the Commissioner and held that a statutory reorganization had been effected between the three old companies and the new company and that Atlas was a party thereto by reason of the fact that it had acquired all of the preferred stock and a majority of the common stock of the new company in a transaction in which, without the participation of Atlas, there would have been no reorganization (R. 141). The Board also found that Atlas was the mainspring of the entire proceeding and hence that the facts in that respect were quite similar to those in *Fifth Avenue Bank of N. Y., Executor*, v. *Commissioner*, 31 B. T. A. 945 (Aff'd. by the Circuit Court of Appeals for the Third Circuit, 84 Fed. (2d) 787). Moreover it found the facts in the instant case to be even stronger for the taxpayer in that Atlas acquired a majority of all classes of stock of the new company which "unquestionably made it a party to the reorganization"

(R. 142) within the literal terms of Section 112 (i) (2) of the Revenue Act of 1928.*

In the court below the Commissioner reverted to the original position (R. 11-14) taken by him in asserting a deficiency, to-wit: that while there was a reorganization effected through a consolidation of the old companies into the new, Atlas was not a party thereto (Petitioners brief below, 8).

The Court, however, held that Atlas was a party to the reorganization within the literal terms of the statutory definition because Atlas had acquired a majority of the stock of all classes of the new company in connection with the consolidation of the three old companies under the plan of reorganization (R. 205). It also held that even if Atlas had not thus come within the literal terms of the statutory definition, it was a party to the reorganization transaction, as that language is commonly understood, because of its intimate connection with the reorganization of the other corporations (R. 205-206).

SUMMARY OF ARGUMENT.

The exchanges and transfers herein constitute one transaction under a plan of reorganization pursuant to corporate business.

The foundation of the plan, from its inception, was in substance the agreements between Atlas and the stockholders of Peerless and Union which contemplated that Atlas, upon acquisition of substantially all of the stock of those companies through exchanges, would transfer the stock thus acquired to the new company which it would control, and would cause the assets and business of the old companies to be transferred to the new company. The plan provided for

*This point was apparently overlooked by the Petitioner in the "Statement" of facts in his Brief (pp. 7, 8), in which it is indicated that the decision of the Board was based solely upon its former decision in *Fifth Avenue Bank of N. Y., Exr.* v. *Commissioner, supra.*

a continuance of interest on the part of the "stockholders"* in the business formerly conducted by Peerless and Union by insuring their acquisition of a substantial stock interest in both the new company and Atlas.

Petitioner concedes that Atlas did acquire a majority of the stock of the new company (Pet. Br. 6) and that the old corporations were consolidated into the new company, resulting in a statutory reorganization in which the new company was "a party" in the statutory sense (Pet. Br. 9). The sole issue here is whether Atlas was also a party to that reorganization. In presenting its argument on this point, respondent contends:

(I) That Atlas was "a party to a reorganization" because it comes within the literal terms of Section 112 (i) (2) of the Revenue Act of 1928;

(II) That Atlas was "a party to the reorganization" within the terms of Section 112 (b) (3) because of its indispensable participation in and inseparable connection with the entire transaction.

It will be observed that the Court below found that to sustain its decision it was sufficient to determine that Atlas was a party to the reorganization on only one of the above grounds, but it concluded that Atlas was a party thereto upon both grounds.

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*The majority stockholders of Peerless and Union are herein referred to as "stockholders."

ARGUMENT.

I.

Atlas was "a party to a reorganization" because it comes within the literal terms of Section 112 (i) (2) of the Revenue Act of 1928.

1. All of the exchanges and transfers here involved constitute but a single transaction under a plan of reorganization pursuant to corporate business, in each step of which Atlas actively participated *and as the result of which it acquired, pursuant to the plan from its inception, a majority of the stock of all classes of the new company and therewith control of the assets and business of Peerless, Black Diamond and Union.* (R. 139, 141)

In asking this Court to reach a contrary conclusion on the above stated issue, Petitioner bases his argument on the premise that Atlas did not participate in the reorganization of Peerless* as defined in Section 112 (i)(1)(A)(Pet. Br. 10); that Atlas' participation in the reorganization was limited to the participation of its subsidiary and cannot, therefore, reasonably be said to have been a party to it under Section 112 (i)(2) (Pet. Br. 10, 13). Whether that premise can be established in fact can best be determined by an analysis of the findings of the Board of Tax Appeals.

In consummating this transaction, all of the transfers and exchanges were made as provided for in the agreements of October 7, 1930, between the parties (R. 136). The principal agreements, all executed on October 7, 1930, were those of Atlas (either directly or through agents) on the one part, and "stockholders" on the other part, wherein the latter agreed to exchange their majority stockholdings in their respective companies for a substantial amount of Atlas stock, cash, and stock of the new company. These agreements made provision for exchanges with the minority

*For some reason Petitioner makes no mention of "Union" and "Black Diamond".

stockholders, substantially all of whose stock was acquired by Atlas under the plan. (R. 132-136, 141)

Under the above-mentioned agreements with the "stockholders" Atlas agreed to cause the three old companies to transfer their assets and business, including their liabilities to the new company formed by Atlas pursuant to the plan for the purpose of continuing the operation of the businesses thus consolidated under its control and to supply the new company with additional working capital of approximately $300,000 (R. 131-133).

To complete the exchanges and commitments made by Atlas in the aforementioned agreements with the majority and minority stockholders of Peerless and Union in which Atlas was obligated to deliver to said stockholders cash, common and preferred stock of Atlas and approximately 43 per cent of the stock of the new company, Atlas invested in the capital stock of the new company up to an aggregate of 21,732 shares of its preferred stock and 32,198 shares of its common stock, necessary to give it control, in consideration for 6,318 shares of Atlas preferred stock, 8712½ shares of Atlas common stock and $960,560.25 in cash (R. 22-23, 131-132). And at the same time Atlas, through its agents, entered into a contract with the new company (R. 83-88, 135) pursuant to which said agents transferred to the new company substantially all of the stock of the old companies in exchange for $632,150 in cash, shares of Atlas common and preferred stock previously acquired by the new company, as stated, and 32,054.54 shares of the common stock of the new company which cash and securities, except 5,000 shares of the common stock of the new company issued to Fletcher and Seligman as nominees of Atlas (R. 136-138), were delivered, pursuant to instructions of said agents, to the stockholders of Peerless and Union (R. 135-136). The new company retained in excess of $300,000 of the cash invested by Atlas for working capital (R. 133).

As the Court stated in *Watts* v. *Commissioner*, 75 Fed. (2d) 981, 982, "The plan of reorganization was the contract

made and performed". Since the agreements and transactions were found by the Board to represent the plan of reorganization as conceived and executed (R. 136, 139), it follows that Atlas acquired its stockholdings in the new company in the reorganization.

There is no basis for its characterization by the Petitioner as a circuitous and involved scheme. Fletcher and Seligman (found by the Board to be the agents of Atlas (R. 141)) in negotiating with the "stockholders" were instructed that they should consider no plan which did not provide for the consolidation of the old companies into a new one which Atlas would control (R. 130, 164). The "stockholders" insisted upon retaining a substantial interest in the assets and business transferred through a stock interest in Atlas and the new company and through being retained in the latter's employment (R. 131, 135, 175, 185). Atlas, on its part, realized from the beginning that the acquisition of the stock of Peerless and Union, except by exchanges substantially as effected, would not only require a prohibitive amount of cash but would not satisfy the "stockholders" (R. 175). Atlas considered it of vital importance to continue the business of the old companies through a separate corporation (which it would control) to prevent serious loss of customers and good will (R. 190-191). The Board found that said agents disclosed the identity of Atlas as soon as the "stockholders" gave "oral assurances they would exchange their stock in Peerless and Union substantially on the basis of the written contracts finally entered into * * *" (R. 130). This was in July, 1930 (R. 195, 205). The contracts between the agents of Atlas and the "stockholders" disclose on their face the identity of Atlas throughout (R. 53-55, 73-75). In the "Tax Guarantee Contracts" with the "stockholders", Atlas was a direct signatory. In these contracts it was provided that the "stockholders" would be reimbursed for either a tax resulting from their receipt of Atlas stock or its subsequent disposition (R. 88-92, 92-97, 97-101). The Court below sustained

this and all of the other administrative findings of the Board as based upon sufficient evidence and therefore conclusive upon it, citing in support, *Beech* v. *Commissioner*, 82 Fed. (2d) 42, and *Phillips* v. *Commissioner*, 283 U. S. 589 (R. 206).

While Petitioner admits that a statutory reorganization was effected in the consummation of the transaction, wherein Peerless, Union and Black Diamond were consolidated into the new company, he contends that Atlas was not a party "within the literal terms of the statutory definition nor within its purpose, * * * " (Pet. Br. 9), because "at no stage in the transactions in this case was Atlas a party to the Peerless reorganization; at the completion as at the outset of these transactions its only relation to the Peerless reorganization was that its subsidiary, the new company, was a party" (Pet. Br. 20), and even that " * * * Atlas was not a party to those exchanges between the old companies and and the new company which did constitute a statutory reorganization, and acquired neither the assets nor any of the stock of the old companies" (Pet. Br. 13).

Whatever might result from the application of the statute to such assumptions of fact need not concern us here for they are contrary to the specific and unchallenged findings of the Board, referred to before in this Argument. Fundamentally, the entire argument of Petitioner is based upon a misconception of what the plan was and how it was carried out. Petitioner's conclusions are necessarily erroneous because they are based on false premises.

In direct conflict with Petitioner's conclusion that Atlas' "* * * only relation to the Peerless reorganization was that its subsidiary, the new company, was a party", using that term in accordance with its ordinary meaning, the facts reveal that no argeements were entered into between the "stockholders" and the new company, except the "Tax Guarantee Contracts" above referred to, in which, as stated, Atlas was also a *direct* party, nor was the new com-

pany a party to any exchange or transfer with the "stockholders".

In fact, all the exchanges and transfers were consummated by Atlas either acting directly or through its agents. Even the actual transfer of the assets of the old companies to the new was effected by Atlas. Before the new company could acquire the assets it was first necessary for Atlas to transfer to it the stock of the old companies.

Thus the Board and the Court below held that the several transfers and exchanges constituted but *one* transaction, under one plan of reorganization both in their inception and execution, that in each step Atlas played a dominating and active part either through direct participation, by its agents, or through its controlling stock interest in the new company and that through completion of the exchanges aforementioned Atlas became the owner of approximately 57 per cent of the common stock and all of the preferred stock of the new company.

The Court below sustained the Board's summary of its findings that:

> "The main features of the plan were that Peerless, Union and Black Diamond were to be consolidated into a new company, Peerless-Union Explosives Corporation, that the stockholders of the old companies would receive for their stock in the old companies stock in the new company, stock in Atlas and some cash. Atlas on its part was to furnish the new company with sufficient cash and sufficient shares of its own common and preferred stock to complete the transaction. In return it was to receive sufficient common and preferred stock in the new company to assure its control." (R. 203.)
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> * * * * * *
>
> "* * * Atlas was the mainspring of the entire proceeding and without its participation there would have been no reorganization and consolidation into the new company." (R. 205-206.)

2. The fact having been established that the several transfers and exchanges here were interdependent steps in and

component parts of one plan of reorganization, the Petitioner may not break up that single transaction into parts to assert a tax. *Prairie Oil and Gas Co.* v. *Motter*, 66 Fed. (2d) 309 (C. C. A. 10th); *Tulsa Tribune Co.* v. *Commissioner*, 58 Fed. (2d) 937 (C. C. A. 10th); *Howard* v. *Commissioner*, 56 Fed. (2d) 781 (C. C. A. 6th), certiorari denied, 287 U. S. 619; *Sage* v. *Commissioner*, 83 Fed. (2d) 221 (C. C. A. 2nd); and *Thurber* v. *Commissioner*, 84 Fed. (2d) 815 (C. C. A. 1st). The Courts have reached the same conclusion where the Commissioner has relied on the inseparability of the plan to prevent a taxpayer from avoiding a tax by breaking it into parts. *Bassick* v. *Commissioner*, 85 Fed. (2d) 8 (C. C. A. 2nd), certiorari denied, 299 U. S. 592; *Ahles Realty Corporation* v. *Commissioner*, 71 Fed. (2d) 150 (C. C. A. 2nd), certiorari denied, 293 U. S. 611; *Starr* v. *Commissioner*, 82 Fed. (2d) 964 (C. C. A. 4th), certiorari denied, 298 U. S. 680.

An analysis of the facts in the above cited cases reveals plans of reorganization, some of the steps of which were interdependent only in that they were provided for in a single plan of reorganization. They were related steps in the sense that one step might not have been consummated but for the *agreement* of the parties to consummate other steps, yet, unlike the present case, they were complete in that chronologically one could be completed without all of the steps being completed. Some of these cases, for instance, involve the exercise of options, the declaration of special dividends with exchange rights and the purchase by one party of stock received by another party in the reorganization. It is in this respect that the facts in the instant case are even stronger in support of the conclusion reached by the Courts in the cases above cited.

The Petitioner having erroneously assumed that the acquisition by Atlas of the stock of the new company was a step separate and apart from the reorganization which admittedly resulted here, erroneously concludes that it should be treated separately in its tax significance.

3. Even if the transaction as a whole, in the instant case, is to be broken up into parts or steps to determine their separate tax significance, it will be observed that viewed from the standpoint of the actual exchanges of stock and transfers, as contrasted with the Petitioner's arbitrary division of the transaction (Pet. Br. 10), each exchange viewed in the light of its ultimate completion constitutes a statutory reorganization. The first and most essential exchange was that made pursuant to the agreements between Atlas and the stockholders of the old companies wherein the latter exchanged substantially all of the stock of Peerless and Union for a substantial amount of stock of Atlas, cash and stock of the new company. This was a reorganization. *Helvering* v. *Watts*, 296 U. S. 387.

In the second corollary and subsidiary exchange made pursuant to the agreement between Atlas and the new company, the latter exchanged approximately 43 per cent of its common stock for substantially all of the stock of the old companies which Atlas had acquired under the preceding exchange.* This was likewise a reorganization under *Helvering* v. *Watts, supra.*

In the third step, the new company under the direction of Atlas acquired the assets and business of the old companies in exchange for the entire outstanding common and preferred stock of those companies. This was a reorganization under *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378.

Viewing these steps, however, in the light of the contracts and the manner in which they were carried out, the conclusion must necessarily follow that the steps were *interdependent* and the completion** of the plan as a whole was the real consideration for each step.

Obviously the exchanges with the stockholders of the old

*The new company also exchanged cash and stock of Atlas, *ante*, pp. 4-6.

**The exchanges were made at one time, on October 7, 1930, at a meeting of representatives of all parties interested (R. 132-136).

companies in the first step could not be completed unless the exchanges in the second step were consummated, because a part of the consideration to be supplied by Atlas in the first step, was shares of stock in the new company which only became available through consummation of the second step. Furthermore, to carry out its obligations to the "stockholders" in the first step, it was necessary for Atlas to cause the consolidation of the old companies into a new corporation, in which, upon completion of the entire transaction, Atlas would be the owner of a majority of all classes of stock, which transaction constitutes the third step.

Before any of these steps could be completed, it was necessary for Atlas, as a part of the plan, to make a sufficient investment (represented by cash and shares of its stock) in the stock of the new company to insure its control and provide it with sufficient assets to carry out its part of the plan.

4. Petitioner assures us (Pet. Br. 20) he is not asking this Court that the separate transfers and exchanges in a " * * * plan of reorganization be viewed as independent transactions with legal consequence different from those which would result were the plan examined at its completion." Proceeding, therefore, on that basis and viewing the transaction at its completion, we find that Atlas had not only acquired a majority of the stock of all classes of the new company (within the express terms of Section 112 (i) (2)) but looking to the substance rather than the form, Atlas had acquired a majority of the stock of all classes and a controlling interest in the business and assets of Peerless and Union in their merged or consolidated form (through ownership of stock of the consolidated company) *as a part of* a single transaction and plan which had no other purpose, from the beginning. As this Court said in *Weiss* v. *Stearn*, 265 U. S. 242: " * * * when applying the provisions of the Sixteenth Amendment and income laws enacted thereunder we must regard matters of substance and not mere form."

From the beginning to the end there were but two parties dealing with each other at arms length, Atlas on the one side and the "stockholders" on the other. These interests thus remained until the completion of the plan when their respective interests converged into the joint enterprise thereafter conducted by the new company. Atlas emerges with a majority of the stock of all classes of the new company, now representing a consolidation of the old companies and the "stockholders" reappear as the owners of a substantial interest in the consolidated enterprise represented by their stockholdings in Atlas and in the new company. The legal significance of the Atlas stock received by the taxpayer, in so far as it bears on the continuity of his interest in the assets transferred, will be considered at length in the second phase of this Argument.

But even if the acquisition by Atlas of a majority of the stock of all classes of the new company is treated as "in connection with" other exchanges and transfers in the plan, rather than as the necessary and ultimate end of the consummation of the plan as a whole (as Respondent contends) it would none the less come within the literal terms of Section 112 (i) (2) since that definition is not limited to any one step in a series of exchanges contemplated under a single plan of reorganization. If the transitory steps heretofore referred to are considered, there are at least two other "acquisitions" which would come within the statutory provision in question since Atlas in one transitory step acquired substantially all of the stock of the old companies and in the consummation of another step, the new company acquired all of the stock of the old companies held by Atlas. These acquisitions were, however, only to accomplish the final purpose and result, *i. e.*, the merging of the business and assets of the old companies into the new and an acquisition by Atlas of a controlling interest therein through acquiring the requisite stock in the new company which qualified it as "a party

to the reorganization'' within the literal terms of Section 112 (i) (2).

The Petitioner admits (Pet. Br. 26) that ''the plan, as carried out, was to have a subsidiary of Atlas, organized for the purpose, acquire the stock and the assets of the competing corporation''. Had Atlas not become the owner of a majority of the stock as a part of the plan, which, when consummated, resulted in the reorganization of the old companies into the new, the latter would not have been its subsidiary.

5. As supporting his contention that Atlas was not ''a party to the reorganization'' within the intendment of Section 112 (i) (2) and 112 (b) (3) of the statute, Petitioner cites *Commissioner* v. *Groman,* 86 Fed. (2d) 670 (C. C. A. 7th) pending in this Court, No. 21, October Term, 1937, and *Bus and Transport Securities Corp.* v. *Helvering,* 296 U. S. 391.

It will be observed that the Commissioner in his brief filed with the Circuit Court of Appeals in *Commissioner* v. *Groman, supra,* (Pet. Br. Below 14), stated, in commenting on the conclusion of the Court in *Fifth Avenue Bank of N. Y., Exr.* v. *Commissioner, supra,* ''that the statutory definition of 'party to a reorganization' is not all inclusive; * * *'', that this construction of the statutory definition is not objectionable but that it had no application there because ''Glidden'' was neither a corporation resulting from a reorganization, nor did it acquire a majority of the stock of another corporation. The Seventh Circuit Court of Appeals, however, apparently based its opinion that ''Glidden'' was not a ''party'' in the statutory sense solely on a narrow construction of Section 112 (i) (2) since it concludes (at page 672) that ''it would, we think, be a forced construction to assume that under such circumstances there were parties other than those defined by the statute''. The Court below, in the instant case, concluded that the Seventh Circuit Court of Appeals had apparently overlooked the interpretative regulations (Article 577, Regulations 74)

which provide that the statute "simply enumerates certain cases with respect to which doubt might arise." (R. 205) It would seem to follow that the decision in the *Groman* case was based solely on the fact that "Glidden" did not acquire a majority of the stock of all classes of the new company to come within the narrow confines of one of the specific examples set forth in Section 112 (i) (2), its dicta notwithstanding.

Respondent, in his brief filed in this Court in opposition to the issuance of a Writ of Certiorari (Resp. Br. 12-14) commented at length on this distinction between the facts in the *Groman* case and those in the instant case, pointing out that Atlas did acquire the requisite majority of stock of all classes of the new company and that the Court below found that Atlas was "a party to a reorganization" within the literal terms of Section 112 (i) (2). The conflict is merely in that part of the decision in the *Groman* case which held that the definition in the above statutory provision was all-inclusive. The real conflict was with *Fifth Avenue Bank of N. Y., Exr.* v. *Commissioner, supra.*

This Court in its opinion in *Bus and Transport Securities Corp.* v. *Helvering, supra,* rejected the contentions of the taxpayer because it found in the transaction no semblance of a merger or reorganization. It follows that if there was no reorganization there could be no "parties" to a reorganization. The transaction there also seems clearly to be outside of the purposes and intent of the reorganization statutes, and as concluded by the Third Circuit Court of Appeals in that case (79 Fed. (2d) 509) clearly within the decision of this Court in *Gregory* v. *Helvering,* 293 U. S. 465.

In *Union Trust Company, Executor,* v. *Heiner,* (W. D., Pa.) 18 Fed. Supp. 801, cited in Petitoner's brief as in conflict with the decision in the instant case, the Court distinguished the facts there from those in the instant case and in *Fifth Avenue Bank of N. Y., Exr.* v. *Commissioner, supra,* in that the taxpayer received no stock in the subsidiary corporation. The facts are not sufficiently set forth in the opin-

ion in the *Union Trust Company* case to determine to what extent, if any, the parent corporation participated as an actual party to the transaction. In that decision also the Court was not called upon to consider what corporations were "parties to a reorganization" because it failed to find that there was a reorganization within the statutory provisions.

The following cases involve facts comparable to those in the instant case and in each one the decision supports the position taken by the Respondent in this section of the Argument that Atlas is "a party to a reorganization" within the literal terms of Section 112 (i) (2). *Ballwood Co.* v. *Commissioner*, 84 Fed. (2d) 733 (C. C. A. 3rd); *Henritze* v. *Commissioner*, 28 B. T. A. 1173; *Armstrong* v. *Commissioner*, 31 B. T. A. 418; *Tulsa Oxygen Company* v. *Commissioner*, 18 B. T. A. 1283; and *First National Bank of Champlain, N. Y.* v. *Commissioner*, 21 B. T. A. 415.

Unlike the facts in the instant case wherein the taxpayer received stock not only of Atlas but also of the new company, it will be noted that in all of the above cited cases the taxpayer received stock *only* in the corporation comparable to Atlas.

In *First National Bank of Champlain, N. Y.* v. *Commissioner, supra*, involving the construction of section 203 (b) (2) of the 1926 Act (identical to section 112 (b)(3) of the 1928 Act) it was the Commissioner who contended that International Paper Company was "a party to a reorganization" because it acquired all of the stock of the new company (Canadian Corporation) which acquired all the assets and liabilities of Riordan Pulp and Paper Company.

The taxpayer there, unlike Respondent in the instant case, however, acquired none of the stock of the new company. The Board considered intervention of the new company to hold title to the former properties of Riordan was immaterial and that even if it were considered that there were two simultaneous transactions, the acquisition of the properties of Riordan by the new company and the ac-

quisition of the new company's stock by the International Paper Company, it would still be a reorganization because both transactions fall within the specific terms of Section 203 (h) (1) (A) of the 1926 Act defining reorganization.

In *Tulsa Oxygen Company* v. *Commissioner, supra,* the transfer by taxpayer of its assets to a subsidiary of "Union Carbide", under an agreement with the latter, (but subsequently changed by a substitution of one of its subsidiaries as the contracting party) for shares of its stock held by still another subsidiary was held to constitute a statutory reorganization in which "Union Carbide" was necessarily considered a party within the statutory sense, since the gain resulting to taxpayer on the receipt of its stock was held non-recognizable under section 203 (b)(3) of the 1924 Act. Like the preceding case cited, taxpayer received no stock in the new company. The Commissioner acquiesced in this decision which was rendered in 1930 (Cum. Bull. IX-2; p. 60). The 1932 Act, passed two years later, carried provisions identical to Section 203 (b)(3) of the 1926 Act and 112 (i)(2) of the 1928 Act.

The decision of the Board in *Independent Oil Company* v. *Commissioner,* 35 B. T. A. —, No. 8, decided November 5, 1936, is very similar in its facts to the instant case. While the principal consideration received by taxpayer was stock of the parent company (Vacuum), it also acquired 8750 out of 35,000 shares of the common stock of the new company. Under the plan, however, the parent company was given a ten-year option to acquire from taxpayer said 8750 shares of the new company.

Vacuum was held to be a party to the reorganization under the definition of Section 112 (i) (2) since it acquired at least a majority of all classes of the new company's stock. To the same effect see *Henritze* v. *Commissioner, supra,* and *Armstrong* v. *Commissioner, supra.*

II.

Atlas was "a party to the reorganization" within the terms of Section 112 (b) (3) because of its indispensable participation in and inseparable connection with the entire transaction.

1. Referring to the various transfers and exchanges constituting the transaction wherein the taxpayer received Atlas stock, it was found by the Board as a fact, which the Court below held conclusive upon it, that:

> "* * * Atlas was the mainspring of the entire proceeding and without its participation there would have been no reorganization and consolidation into the new company." (R. 141)

This finding was based upon the following more specific evidentiary facts established by Respondent before the Board:

1. Atlas executives conceived the plan (R. 129, 155, 175);
2. Atlas had sound business reasons for desiring to obtain control of the business and assets of Peerless and Union (R. 129, 141, 154-155);
3. Atlas initiated negotiations, and through its agents contracted for and was a party in fact to the various exchanges effectuating the reorganization (R. 130-136, 155, 160, 173-177, 182-190);
4. Atlas supplied the principal consideration, to-wit: its own stock and cash (R. 22, 131-132);
5. Atlas caused the new company to be organized and caused its own nominees to be made its President and Vice-President (R. 22, 131);
6. Atlas guaranteed performance of the new company's obligations regarding income tax payments resulting from the consummation of the plan (Exhibits F, G, H, and J,—R. 88-103, 135);
7. Atlas supplied the new company with the needed working capital (R. 22, 132).

Atlas' indispensable participation in and inseparable connection with the transaction being thus established, the issue arises as to whether or not it follows therefrom that Atlas was "a party to the reorganization", within the meaning of that phrase as used in Section 112 (b) (3). This issue constitutes the second main section of Respondent's argument. It will be considered from a point of view entirely independent of the question of whether or not Atlas has qualified as a party to the reorganization here within the literal terms of Section 112 (i)(2), to which question the first main section of the Respondent's argument was devoted.

2. On this issue it should be observed at the outset that Congress, in describing "a party to a reorganization", in Section 112 (i)(2) did not purport to write an all-inclusive definition of the phrase. This subsection, in contrast to Section 112 (i)(1) which defines what "reorganization" *means*, uses, instead, the word *"includes"*. This clearly imports that Congress intended that there are parties not qualifying within the specific examples inserted in the subsection, who nevertheless may be parties to the reorganization within the statutory meaning of that phrase, as used in Section 112 (b)(3).

This connotation of the word "includes" is not left to speculation, but is made explicit by the definition of that word in Section 701 (b) of the 1928 Act, which provides:

> "The terms 'includes' and 'including' when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined."

See in this connection *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121.

Furthermore, in Article 577 of Regulations 74 (promulgated under the Revenue Act of 1928) it is stated, with respect to the definition in Section 112 (i)(2) of "a party to a reorganization":

"This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise."

It is significant that Section 112 (i)(2) of the Revenue Act of 1928 is a re-enactment in identical language of Section 203 (h)(2) of the 1924 and 1926 Acts, and was re-enacted as Section 112 (i)(2) of the 1932 Act. The Regulations promulgated under these various Acts all contain a reference to this definition in language identical with that quoted above. Since this Section has been re-enacted without change in three Revenue Acts subsequent to its original enactment in 1924, and since Regulations under such Acts have been promulgated explaining it in identical language, Congress must be taken, in re-enacting the Section, to have approved such regulations. See *Helvering* v. *Bliss,* 293 U. S. 144; *Helvering* v. *Minnesota Tea Company, supra.*

Petitioner in his brief argues that Section 112 (i)(2) must be read as if it were nothing more nor less than a part of Section 112 (i)(1), from which he concludes that if Atlas was not one of the reorganized parties under Section 112 (i)(1), it could not be a party to a reorganization within the purport of Section 112 (i)(2). But this treatment of the latter section makes it an entirely unnecessary appendage to the reorganization provisions of the Act instead of an actual and explanatory part thereof, as Congress intended. Section 112 (i)(2) is no more to be read as limited by Section 112 (i)(1) than is Section 112 (i)(1)(A) to be given a narrow and restricted significance because of Section 112 (i)(1)(B). *Helvering* v. *Minnesota Tea Co., supra.* To complete the analogy it is to be noted that Section 112 (i)(2) was, as was Section 112 (i)(1)(B), incorporated into the tax laws for the first time in the 1924 Act, while the provisions of Section 112 (i)(1)(A) were contained in the 1921 Act. See also the decision in *John A. Nelson Company* v. *Helvering,* 296 U. S. 374, 377, where, in the Opinion of this Court, Mr. Justice McReynolds pointed out that Section 203 (h) (1) (A) of the 1926 Act "* * * must not be confused

with paragraph (h) (2) * * * ", which corresponds to Section 112 (i)(2) of the 1928 Act.

Respondent's contention in this respect is further substantiated by the fact that Section 112 (i)(2) makes no specific mention of the situation in which one corporation exchanges its property for stock of another corporation. Notwithstanding this fact, in *Helvering* v. *Minnesota Tea Co., supra,* and *John A. Nelson Company* v. *Helvering, supra,* this Court necessarily determined in holding that the transactions there resulted in a statutory reorganization, that the corporation whose property or stock was acquired was "a party to the reorganization" within the plain intendment of Section 112 (b)(4). This represents a judicial determination by this Court that Section 112 (i)(2) does not constitute an "all-inclusive" definition of the phrase "a party to a reorganization".

3. The Respondent contends that Atlas, because of its indispensable participation in and inseparable connection with the reorganization which resulted in the consolidation of Peerless, Union and Black Diamond into a new corporation under Atlas' control, must be *"included"* as a party to that reorganization within the meaning which Congress intended to give to that phrase, in describing it in Section 112 (b) (3).

While this Court may have considered this question in reaching its opinions in *Helvering* v. *Watts, supra,* and the *Minnesota Tea Co.* case, *supra,* such opinions do not specifically discuss this point. It has, however, been specifically discussed in a number of cases before the Board of Tax Appeals and before the Federal Circuit Courts of Appeal. See *Tulsa Oxygen Co.* v. *Commissioner, supra; Independent Oil Company* v. *Commissioner, supra; Fifth Avenue Bank of New York, Exr.* v. *Commissioner, supra.*

In each of the foregoing cases there was a corporation in a position analogous to that of Atlas in the transactions here, which corporation was not itself reorganized. Stock

of said corporation was acquired by the taxpayer in each case, in exchange for a prior direct or indirect interest of the taxpayer in assets transferred under the plan to its subsidiary. In each of the foregoing cases such corporation (comparable to Atlas) was held to be a party to the reorganization, and the gain or loss resulting to taxpayer in the transaction was, therefore, not recognized. It is true that the series of transactions which culminated in the result described above have not been the same in each case. For instance, in the *Ballwood* case it was the taxpayer who undertook the organization of the subsidiary corporation to which its assets were transferred and the stock of that corporation in its hands was then exchanged for stock of the corporation (comparable to Atlas) which was not reorganized. On the other hand, in the *Fifth Avenue Bank* case, the circumstances were very similar on this point to the facts in the instant case. In each of the cases, however, a party intimately connected with the transaction, whether or not a party within the literal terms of Section 112 (i)(2), was held to be a party to the reorganization.

Tending to a contrary conclusion on this general question is the case of *Commissioner* v. *Groman, supra.* Inasmuch as this case has been analyzed in an earlier portion of this brief, it is deemed unnecessary to discuss it further here.

In addition to the *Groman* case, the Petitioner has cited, in opposition to Respondent's contentions in this connection, the cases of *Bus and Transport Securities Corporation* v. *Helvering, supra,* and *Union Trust Company, Exr.,* v. *Heiner, supra.* Respondent takes issue with Petitioners' contention that these cases control the instant case. *Bus and Transport Securities Corporation* v. *Helvering, supra,* has been analyzed at length in Petitioner's brief, but he has failed to state the controlling factor in the decision, as made clear by the opinion of this Court, namely, that in the various transfers and exchanges there involved, there was no

semblance of a merger or consolidation. Similarly, the Court in *Union Trust Company, Exr.*, v. *Heiner, supra,* failed to find a reorganization in the facts before it. Obviously it is futile to discuss whether or not a corporation can be a party to a reorganization if there is no reorganization to begin with. *Claude Neon Lights, Inc.*, v. *Commissioner,* 35 B. T. A. —, No. 63. The Petitioner has conceded in the instant case that there was a reorganization and the sole question is whether or not Atlas was a party to it. In this connection, it should be observed that in the argument of the instant case in the Court below, Petitioner laid great stress upon the *Bus and Transport Securities Corporation* case. The Court, however, held that case to be clearly distinguishable on its facts, and not in any way determinative of the question here involved.

With further reference to the Petitioner's argument, in the footnote on page 24 of his brief, that the Commissioner has consistently refused to consider as parties to the reorganization those corporations which play an active role in its instigation and financing, Petitioner has doubtless overlooked the significant fact that the Commissioner acquiesced in the decision in *Tulsa Oxygen Company* v. *Commissioner, supra* (See Cum. Bull. IX-2, p. 60); and also the fact that in *First National Bank of Champlain, N. Y., supra,* it was the Commissioner himself who sought to establish that the party in the position analogous to that of Atlas here was a party to the reorganization. Furthermore, although by the time the decision of the Circuit Court of Appeals for the Third Circuit in *Fifth Avenue Bank of New York, Exr.*, v. *Commissioner, supra,* had been rendered, it was apparent that a federal question of considerable importance in the administration of the Revenue Laws was involved, the Commissioner did not petition this Court for issuance of a Writ of Certiorari in that case.

4. Apart from questions of statutory construction, and the inseparability of the various steps in the transaction at bar, there remains the question whether it is open for

Petitioner to argue before this Court that Atlas' stock in the taxpayer's hands did not represent a sufficient continuity of interest in the assets transferred to bring it within the exemption provisions of Section 112(b)(3), and the further question, if Petitioner may be heard on this point, whether his argument is sound.

Respondent submits that Petitioner cannot now raise for the first time the question of such lack of continuity of interest, because he did not raise that question either before the Board of Tax Appeals or before the Circuit Court of Appeals. (*Helvering* v. *Minnesota Tea Co., supra; Helvering* v. *Tex-Penn Oil Co.*, 300 U. S. 481) In the Board the issue was primarily whether Atlas acquired a majority of the stock of all classes of the new company and whether the transaction, as a whole, constituted a plan of reorganization. The Board having held against the Commissioner on these points he came to the Court below on the sole issue that Atlas was not an open and signatory party to the basic agreements in pursuance to which the exchanges and transfers were made, but admitted that a statutory reorganization had been effected by the consolidation of the old companies into the new company in which Atlas acquired a majority of the stock of all classes. While in substance Petitioner here persists in the issue that Atlas was not a party to the exchanges, which consummated the reorganization (although admitting that Atlas acquired a majority of the stock of all classes of the new company), he contends that the stock of Atlas does not represent to Respondent a sufficient continuity of interest in the assets and business transferred by Peerless to the new company. No mention whatever is made until the case reaches this Court of the question of "continuity of interest," nor were any cases cited in his Brief below, on that precise point.

Even if it is open to Petitioner to raise the issue of continuity of interest at this late stage in the proceedings, neither the facts nor the law sustain his position. This will be apparent upon an examination of the reason and purpose

of Congress in providing for non-recognition of gain in certain reorganization transactions, and the application of such reasons and purpose to the facts in the instant case.

Before undertaking this examination, it should be observed that the necessity for continuity of interest has not been passed upon by this Court in connection with the specific question whether a corporation, not itself reorganized, can qualify as a "party", in the statutory sense, to an admitted reorganization. In view of the fact that Sec. 112 (i)(2) was enacted to include within the definition of a "party to a reorganization" certain doubtful cases, this Court may conclude that in determining what corporations qualify as parties to an *admitted reorganization,* Congress intended that the definition be given a liberal construction so as not to require the spelling out of a continuity of interest in the transferred assets, as must be done to establish in the first instance that there has been a reorganization. If this Court should so conclude, then further consideration of this question would be unnecessary. Respondent maintains, however, that if it is required of him to demonstrate that his acquisition of Atlas stock represented a continuity of interest in the assets with which he was formerly identified, then that requirement is met in the instant case.

The fundamental reason for non-recognition of gain in exchanges of securities involved in a reorganization is that after the exchanges the taxpayer's money is still invested in the same interests or business as that in which it was originally made, although in a modified corporate form. A tax on the profit is deferred until it is realized in cash, or other property not of the same kind. The underlying principle, therefore, is not tax exemption, but tax postponement.

This Court in construing the parenthetical phrase in Section 112 (i)(1)(A) has interpreted its meaning in such a way as to require that the transferor must retain a continuity of interest of substantially the same character in the assets transferred. In so doing, it has tended to make the test as to whether or not there is continu-

ity of interest determinative of whether the reorganization is one in which gain or loss is to be recognized in the transaction. Obviously, it is the taxpayer's continued interest in or identification with the assets with which he parts, as represented in what he receives, that the Court examines.

This test as to continuity of interest has been recognized and applied by this Court in several cases. In *Pinellas Ice and Cold Storage Company* v. *Commissioner*, 287 U. S. 462, this Court stated that to constitute a transaction within the parenthetical expression of Section 112 (i)(1)(A), "the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes." In later cases, this Court added that "this interest must be definite and material; it must represent a substantial part of the value of the thing transferred" but that the fact "that the relationship of the taxpayer to the assets conveyed was substantially changed" did not take the case out of the statute (*Helvering* v. *Minnesota Tea Company, supra*); and that "the statute does not require participation in the management of the purchaser * * *" (*John A. Nelson Company* v. *Helvering, supra*).

In *Helvering* v. *Watts, supra,* which we submit is a parallel to the present case, the taxpayer with two other individuals, owned all of the common stock of Ferro-Alloys. Pursuant to an agreement with the Vanadium Company, they transferred all of their stock in Ferro-Alloys to Vanadium in exchange for certain bonds of Ferro-Alloys, which were guaranteed by Vanadium, and certain shares of Vanadium common stock, and thereafter Ferro-Alloys continued in business. This Court held that the gain resulting from the acquisition by taxpayer of the Vanadium stock was not taxable.

If we analyze these facts, we find that before the reorganization took place, the taxpayer, an individual, had an interest in the business and assets of Ferro-Alloys, through

ownership of stock in that company. At the conclusion of the transfer and exchange he no longer owned this stock, but in its place had received stock in Vanadium, a corporation which had acquired all of the stock of Ferro-Alloys. In addition, the taxpayer had received certain bonds of Ferro-Alloys, guaranteed by Vanadium. This Court, in finding that the gain resulting from the acquisition of the stock and bonds was non-taxable, determined that there had been a reorganization, and that the Vanadium stock in taxpayer's hands after consummation of the transaction represented a continuity of the taxpayer's former interest in the business and assets of Ferro-Alloys, through Vanadium's ownership of all of Ferro-Alloys stock.

In the instant case, before Atlas came into the picture the taxpayer owned preferred and common stock of Peerless and thus had an interest in its business and affairs. Under the plan of reorganization, he agreed that the business and assets of Peerless should be transferred to another company (the new company) and that he would exchange his Peerless stock for cash, stock of the new company (corresponding to the bonds received by taxpayer in the *Watts* case), and preferred and common stock of the corporation which was to control the new company (corresponding to the Vanadium stock in the *Watts* case). Thus, at the consummation of the plan the taxpayer owned stock of the company which emerges from the reorganization in control of the new company owning the business and assets with which taxpayer had been formerly identified as a stockholder of Peerless. The only difference between this case and the *Watts* case, is that here the form of the ownership of the business and assets in which taxpayer was interested has changed, in that, instead of remaining in their original corporate setting, as in the *Watts* case, they have, as a part of the plan to which taxpayer subscribed, been combined with other business and assets (of Union) into a new and enlarged corporate structure. This difference is insubstantial and entirely immaterial from the viewpoint of the tax-

payer's continuity of interest in the original business and assets of Peerless. In both cases at the conclusion of the reorganization transaction the taxpayer is equally removed from the assets and business with which he was originally identified.

It is respectfully submitted, therefore, that *Helvering* v. *Watts* is squarely in point and is an authoritative precedent in a decision of this Court showing continuity of interest here to establish non-recognition of taxpayer's gain resulting from his acquisition of preferred and common stock of Atlas.

In addition to the discussion of continuity of interest by this Court in the foregoing cases, the Respondent's conclusions on this point are also supported in the opinions in the following cases: *Cortland Specialty Company* v. *Commissioner*, 60 Fed. (2d) 937 (C.C.A. 2nd), certiorari denied, 288 U. S. 599; *Fifth Avenue Bank of N. Y., Exr.* v. *Commissioner, supra; Commissioner* v. *Kitselman*, 89 Fed. (2d) 458 (C. C. A. 7th); *Western Power Corp.* v. *Commissioner*, 34 B. T. A. 618; *Independent Oil Company* v. *Commissioner, supra; Kaspare Cohn Co., Ltd.*, v. *Commissioner*, 35 B. T. A. —, No. 91; *Tyng* v. *Commissioner*, 36 B. T. A.—, No. 4.

5. Apart from the authority of the *Watts* case, it is submitted that, on principle, it is logical to hold that the ownership of stock of a parent company represents a definite interest in the business and assets of a subsidiary. The decisions of this Court hereinabove referred to disclose that the problem is not in what precise *form* the interest is retained but whether or not it is real and substantial. Thus, in *Pinellas Ice and Cold Storage Company* v. *Commissioner, supra,* although the taxpayer had received what are ordinarily termed securities, *i. e.*, short term notes, it was held that continuity of interest was lacking because these securities represented little, if anything, more than cash so far as taxpayer's future identification with the former enterprise was concerned.

In contrast, in *John A. Nelson Co.* v. *Helvering, supra,* preferred stock of the company acquiring the business and assets with which the taxpayer had been identified was held substantially to represent a continuation of that identification within the purview of the reorganization sections of the tax law, even though such preferred stock carried with it no voting power.

From this comparison it would appear that the nature of the security received by the taxpayer must, in some way, import that the taxpayer will *continue* his identification with the business and affairs of that enterprise in a material and substantial way in a manner somewhat akin to his prior identification. From this point of view, it is respectfully submitted that the stock of a corporation which takes over the business and assets with which the taxpayer has been identified, and places them in the hands of another corporation which it controls, represents as substantial a guaranty of a continuation of taxpayer's identification with that business and those assets as if he had received stock of the controlled corporation, or as if the assets themselves had been acquired by the controlling corporation.

Here again *Bus and Transport Securities Corporation* v. *Helvering, supra,* upon which Petitioner appears to place so much reliance, must be distinguished. In that case to be sure, some sort of remote relationship between the taxpayer and the stock of the bus companies with which it parted may be spelled out of the situation resulting from the consummation of the various transfers. But this is to be done only by tracing that relationship through an elaborate super-structure of corporate entities, at least two of which seemed to have been called into being not for any continuing purpose in connection with the operation of the business, either of the bus companies or of Public Service Corporation of New Jersey, but for the sole purpose of acquiring and transferring stock, after which their corporate functions ceased. This Court refused to characterize such a relationship or interest as definite and immediate, and

thus concluded that no true reorganization had taken place. But this is a far cry from refusing to find such definite and immediate interest here, where the new company ultimately acquiring the business and assets with which taxpayer had been identified, was to utilize them in the normal and continuing conduct of its business. Nor can it be a denial of definite and immediate interest in the sense in which those terms were used in *Bus and Transport Securities Corporation* v. *Helvering, supra,* that the taxpayer's interest in his former property takes the form, after consummation of the reorganization, of stock in a company which in a normal and thoroughly unartificial way controls the corporation which has acquired that property.

To summarize the situation in the instant case in another way, the fundamental and dominating idea of the whole transaction from the taxpayer's point of view was that he would retain an active and substantial continuing interest in the same business and affairs with which he was connected prior to the consummation of the plan of reorganization. He was approached by Atlas with a plan which, in its essence, consisted in no more than a change in the form of the business in which he was engaged to the extent that it would be combined with another competing business, and the two so combined would be taken in under the control of a third and larger corporation, to-wit, Atlas. To this he agreed, and the consideration for which he asked and which he received, was that his identification with his original enterprise would be continued, not only through his participating in the new and larger enterprise through his stock ownership in the new company, but also through stock ownership in the company which would manage and control it. How can it reasonably be argued that this latter company, Atlas, was not a party to the transaction in the ordinary and usual meaning of that phrase, or that Congress, in legislating on the subject to provide for non-recognition of gain or loss in certain described cases without expressly denying it in others, could have intended that this simple and normal situation should

be excluded? What phrase would be more apt in describing the relation of Atlas to the reorganization than that it was a "party" thereto?

CONCLUSION.

In view of the foregoing, the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * * *

(3) *Stock for stock on reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *Same—Gain of corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * * *

(c) *Gain from exchanges not solely in kind.*—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of

his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(d) *Same—gain of corporation.*—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * * * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.*—As used in this section, the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

Art. 577. *Definitions.*—The term "reorganization", as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation, within the meaning of section 112, when owning—

(1) At least 80 per cent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 574 are complied with if "stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 33.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

RAYMOND I. BASHFORD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

Since Respondent's original brief was filed on October 13, 1937, this Court has rendered an Opinion in the case of *Herman C. Groman* v. *Commissioner of Internal Revenue*, No. 21, hereinafter referred to as the *Groman case*, and on the same day, November 8, 1937, ordered that the instant case be restored to the docket for reargument on December 13, 1937.

This supplemental brief will be confined to pointing out the clear distinction in facts between the instant case and the *Groman case* and to restating Respondent's argument

in its original brief on those points on which the Opinion in the *Groman case* has shed additional light.

As we understand the Opinion in the *Groman case,* Glidden was held not to be a party to a reorganization:

> *First*—Because Glidden did not come within the terms of Section 112 (i)(2) in that "it was not a corporation resulting from the reorganization, and it did not acquire a majority of the shares of voting stock and a majority of the shares of all other classes of stock *of any other corporation in the reorganization.*" (Emphasis added.)
>
> *Second*—That while Section 112 (i)(2) is not a definition of the term "a party to a reorganization" and does not exclude all corporations not specifically described therein, yet Glidden was not "a party" because it was not a corporation whose relation to the exchange between Indiana and Ohio would in common usage be so denominated, since Glidden received nothing from the shareholders of Indiana and transferred nothing to them, the exchange being solely between the stockholders of Indiana and Ohio.
>
> *Third*—That the fact that Glidden stock did not represent to the taxpayer a definite and substantial continuity of interest in the stock of Indiana transferred by him to the new company confirms the conclusion reached in the preceding paragraph, that Glidden was not a party to the reorganization effected by the exchange between the stockholders of Indiana and the new company.

In summarizing its conclusions, the Court held that Glidden was not "a party to the reorganization" within either the letter or the spirit of the Revenue Act.

Considering the instant case in the light of these conclusions reached by the Court in the *Groman case,* Respondent's argument will follow, as far as possible, the order in which these conclusions are stated above.

Atlas, unlike Glidden, was "a party", within the literal terms of section 112 (i) (2), to a reorganization as defined in section 112 (i) (1) (A) of the Revenue Act of 1928.

Atlas acquired not only a majority of the voting stock and a majority of the stock of all other classes of another corporation (the new company) *in the reorganization* but *of all* of the other corporations (Peerless and Union) *in the reorganization.* These transactions, considered separately or as a whole, constitute statutory reorganizations under Section 112 (i)(1)(A). Atlas was therefore so evidently a party (as that term is used in Section 112 (b)(3) of the Act) "* * * to the reorganization that we do not need section 112 (i)(2) to inform us of the fact," *and furthermore, it comes squarely within the literal terms of that section.*

In this respect the instant case is clearly distinguishable from the *Groman case* in which this Court found that Glidden did not acquire a majority of the shares of the voting stock and a majority of the shares of all other classes of stock of *any other* corporation in the reorganization.

The difference in the facts cannot be measured alone, however, in terms of the larger interest which Atlas acquired in the new company, significant as that may be in considering the literal terms of the statute. To determine the deeper significance of this difference it is necessary to consider the means by which Atlas emerged with the majority of the stock of all classes of that company at the conclusion of the transaction and the purpose sought to be accomplished by the transaction considered as a whole.

Atlas actually acquired, as a part of the plan, on October 7, 1930, substantially all of the shares of Peerless and Union in direct exchanges with the taxpayer and the other stockholders of those companies in part consideration for which it delivered to the shareholders 6318 shares of Atlas preferred stock and 8712½ shares of its common stock. (R. 133-136.) *It was in this exchange that Respondent received*

Atlas stock, the gain on the acquisition of which is the subject matter of the present controversy. (R. 133.)

1. The essential differences in the facts of the two cases are clearly demonstrable from the following summaries:

Groman Case.	*Instant Case.*
1. The plan of reorganization of Indiana and Ohio was provided for in an agreement between Glidden and the shareholders of Indiana.	1. The plan for consolidating Peerless and Union with Atlas was provided for in agreements between agents of Atlas, and the shareholders of Peerless and Union. (R. 133-134.)
2. Glidden, as a preliminary step organized Ohio with a capital structure divided into preferred and common shares; and subscribed to all of its common stock for which it paid cash and shares of Glidden prior preference stock.	2-a. Atlas organized the new company on September 22, 1930, with a nominal issue of ten shares of preferred and ten shares of common stock which it subscribed to for cash. (R. 131.) On October 6, 1930, Atlas increased the authorized capital of the new company to an amount sufficient to provide for the exchanges to be made under the plan. (R. 131.)
	b. Atlas, through its agents, entered into a contract with the new company which in substance provided that it would deliver to the new company the stock and/or assets[1] of Peerless and Union, $960,-

[1] In the agreements between Atlas and the stockholders of Peerless and Union, Atlas was given the option, upon acquiring the stock of those companies " * * * to effect the liquidation of the three former companies or the transfer of their assets subject to their liabilities, * * *" to the new company. (R. 53, 73.) This option would have enabled Atlas to have proceeded in any one of three ways: (1) To acquire their assets in liquidation and thereafter

Groman Case.	*Instant Case.*
	560.25[2] cash, 6318 shares of Atlas preferred, and 8712½ shares of Atlas common stock in consideration *for all*[3] *of the stock, both common and preferred of the new company* and the *redelivery*[4] to Atlas of $632,150 cash, and the above mentioned shares of Atlas common and preferred stock.
3. The stockholders of Indiana agreed to transfer	3. Atlas' agents agreed to deliver to the stockholders of

transfer them to the new company, or (2) to retain the stock of the old companies, cause their assets to be transferred to the new company and thereafter continue their separate corporate existence as holding companies of stock of the new company to which Atlas was entitled under the plan, or (3) to transfer the stock of the old companies to the new company and thereafter cause the new company to take such corporate action as was necessary to effect a dissolution of the old companies and a transfer of their assets to the new company. In exercise of its option Atlas adopted alternative (3) above.

[2] The contract between Atlas' agents and the new company in part provided that Atlas in acquiring the stock of the new company would deliver to it " * * * such amount of cash and securities of Atlas as may be necessary for New Company to acquire the securities and/or assets of Peerless and Union from Promoters, as herein provided, and to retain a cash working capital of $300,000." As a few minority stockholders failed to participate, the new company *redelivered to Atlas' agents* only $632,150, leaving the new company the balance of $328,410.25. (R. 84-85.)

[3] Atlas on receipt of the stock of the new company was obligated to deliver 27,054.54 of the common shares to the stockholders of Peerless and Union. (R. 137.)

[4] The Atlas stock and cash was to be delivered to the new company in fulfillment of Atlas' obligations in the agreements with the stockholders of Peerless and Union to underwrite the preferred stock and 32,198 shares of the common stock of the new company, as a payment against the legal issuance by the new company of that amount of stock. (R. 85, 132.) The *redelivery* to Atlas of said cash and Atlas securities together with the *delivery* of the stock of the new company put Atlas in a position to complete its exchanges with the stockholders of Peerless and Union. (R. 84, 135.)

Gróman Case.	*Instant Case.*
their shares to Ohio in exchange for a stated number of prior preference shares of Glidden and of preferred shares of Ohio at an agreed valuation and sufficient cash to equal the appraised value of Indiana's assets.	Peerless and Union approximately $632,150 in cash, 6318 shares of Atlas preferred stock, 8712½ shares of Atlas common stock and 27,054.54[5] shares of the common stock of the new company in exchange for substantially all of the shares of Peerless and Union. (R. 133-134, 136-137.)
4. The shareholders of Indiana received from *Ohio* all of its preferred stock and certain shares of prior preference stock of Glidden in exchange for which they transferred to Ohio all of the stock of Indiana.	4-a. In a series of exchanges consummated on October 7, 1930, the stockholders of Peerless and Union delivered to Atlas substantially all of the stock of those companies.[6] (R. 136, 193)
	4-b. Atlas delivered to the new company 8712½ shares of its common stock, 6318 shares of its preferred stock[7] and approximately $960,000.00 in cash and *substantially all of the shares of Peerless and Union.* (R. 22, 29, 84-85, 132, 135-136.)

[5] These are the amounts actually exchanged as found by the Board. (R. 136.) The agreements with the stockholders merely provided the rate of exchange, not specifying the total number of shares to be delivered. (R. 55, 74.)

[6] All but a few scattered minority stockholders of Peerless and Union participated in the exchanges and their stock was acquired by the new company shortly after the reorganization was consummated on October 7, 1930. (R. 135, 177.)

[7] These certificates of Atlas common and preferred stock were made out in the names of the stockholders of Peerless and Union (R. 22) to whom they were ultimately to be delivered by Atlas. (R. 29-31.)

Groman Case.	*Instant Case.*
	4-c. The new company redelivered to Atlas, in exchange therefor, the certificates of Atlas common and preferred stock, referred to in the preceding paragraph, $632,150.00 cash *and all of the preferred and common stock of the new company.*[8] (R. 23, 132, 135-136.)
	4-d. Atlas delivered to the stockholders of Peerless and Union 8712½ shares of Atlas common stock, 6318 shares of Atlas preferred stock and approximately $632,150 in cash and 27,054.54 shares of the new company common stock. (R. 132-137.)
5. The new company acquired the assets of Indiana in liquidation of its stock and Indiana was dissolved.	5. The new company acquired the assets of Peerless and Union in liquidation of their stock and caused the old companies to be dissolved. (R. 136.)
6. Ohio continued to operate the business formerly conducted by Indiana. Glidden became the sole owner of the new company's common stock and the former	6. The new company continued to operate the businesses formerly conducted by Peerless (including its wholly owned subsidiary, Black Diamond) and

[8] All of the preferred stock of the new company, *i. e.* 21,732 shares, and 32,198 shares of the common were issued to Atlas direct (R. 132); 5,000 shares of the common stock of the new company were issued to Fletcher and Seligman as nominees of Atlas (R. 137-138), and 27,054.54 shares of the common stock of the new company, being the balance issued under the plan, were delivered to the stockholders (or their representatives) of Peerless and Union on October 7, 1930, pursuant to the agreements. (R. 136-137.)

Groman Case.	*Instant Case.*
shareholders of Indiana became the sole owners of its preferred stock.	Union. Atlas became the owner of all the new company's preferred stock and 57% of its common stock.[3]

2. The Board of Tax Appeals found that Fletcher and Seligman, designated "Promoters" in the agreements, were agents of Atlas and that they disclosed this fact to the majority stockholders of Peerless and Union as soon as the latter indicated they would be interested in participating in a plan of reorganization substantially as consummated on October 7, 1930 (R. 130). This was in July 1930 (R. 195). There is no evidence in the case to the contrary and Petitioner acquiesced in the Board's findings by abandoning assignments of error in the court below. Obviously Fletcher and Seligman were contracting parties, in behalf of Atlas, with both the new company and the stockholders of Peerless and Union and hence were not agents either of the new company or said stockholders. Nor has Petitioner ever raised any question as to that conclusion prior to his Supplemental Brief in this Court.

Petitioner, in his Supplemental Brief, erroneously states that the agents of Atlas did not acquire the stock of Peerless and Union for Atlas but merely acted as a conduit for passing that stock to the new company. There is no support for this contention in the evidence or in the findings of the Board. On the contrary they acquired the stock for Atlas and this is one of the fundamental distinctions between the plan of reorganization here and the plan in the *Groman case*. Here it was a part of the plan from its inception that

[3] The plan contemplated that the new company would issue not in excess of 21,732 shares of preferred and 65,000 shares of common stock in consummation of the plan. After fulfilling its commitments to the stockholders of Peerless and Union to deliver 27,054.54 shares of the common stock of the new company, Atlas was entitled to retain, and did retain, the ownership of the balance, or all the preferred and 57 per cent or 37,198 shares of the common stock. (R. 136-138, 179.)

Atlas and *not* the new company would participate in all the exchanges, whereby the stocks and/or assets of Peerless and Union would be consolidated with Atlas. Atlas, unlike Glidden, was a party to all of the exchanges while the new company was a party only to exchanges with Atlas. In order that Atlas, rather than the new company, could consummate the exchanges, it was necessary for Atlas to acquire the stock of Peerless and Union and likewise acquire all of the stock of the new company. Upon acquiring the stock of all three companies, Atlas was in a position to complete its exchanges with the stockholders of Peerless and Union, cause the old companies to liquidate and transfer their assets to the new company, and at the same time retain the ownership of a majority of the common and preferred stock of the new company.

On October 7th, when the plan of reorganization was consummated, the stockholders of Peerless and Union, in order to perform *their part* of the agreements, were obligated *only* to deliver to Atlas their certificates of stock in the old companies. This they did. Atlas *on its part* was obligated not only to exchange for those shares a certain consideration, in the form of shares of Atlas, cash and shares in the new company, *but also* to undertake the formation of the new company and to furnish if with additional working capital.

The stockholders of Peerless and Union did not participate in the contract or exchanges between Atlas and the new company. Atlas organized the new company as a receptacle for the business and assets of Peerless and Union. Through this contract with the new company, *Atlas, not the new company* (as in the *Groman case*), put itself in a position to complete the exchanges direct with the stockholders of Peerless and Union. Petitioner has asked this Court to find that Atlas did not acquire the stock of Peerless and Union within the statutory meaning because, he contends, Atlas was bound to immediately transfer that stock to the new company. In reaching that erroneous conclusion Petitioner overlooks two important considerations:

First. Under its agreements with the stockholders of Peerless and Union, Atlas was not obligated to convey the stock of the old companies to the new company, but, as previously stated herein,[10] Atlas could have continued to retain those shares or could have made any other disposition of them it chose so long as it effected the transfer of their assets to the new company. Thus Atlas could have continued the corporate existence of Peerless and Union as holding companies of stock of the new company to which Atlas was entitled, or it could have liquidated those companies, acquired their assets and itself transferred their assets direct to the new company.

Second. Petitioner has erroneously assumed that by reason of Atlas' delivery of the shares of Peerless and Union to the new company, it thus divested itself of the beneficial interest in those shares or its proprietary interest in the business and assets of Peerless and Union, represented by their outstanding shares. On the contrary, upon the delivery of those shares to the new company, the latter was *bound* to deliver to Atlas *all of its stock* to be issued under the plan. Atlas on the other hand was entitled to retain the ownership of all of said stock, subject to its commitment to the stockholders of Peerless and Union, as the net result of which, Atlas became the owner of all the preferred and 57 per cent of the common stock of the new company. Thus in fulfilling its commitment to the stockholders of Peerless and Union, Atlas was divested, in terms of its proprietary interest in the business and assets of Peerless and Union, of only *the difference* between *substantially all* of the shares of both individual companies and a *majority* of the shares of all classes of the combined company. The new company's sole assets at the completion of the plan, except for approximately $300,000 working capital supplied by Atlas, were the assets previously owned by Peerless, Black Diamond and Union. Thus, Atlas merely divested itself of one

[10] See Footnote p. 4.

form of stock interest for another form of stock interest no less direct in its proprietary interest in the assets of Peerless and Union.[11]

The change in Atlas' interest was one purely of form. No new corporate entity was interposed to insulate the directness of that interest. Thus Atlas acquired *direct from the shareholders of Peerless and Union, as its interest in those companies, the majority of the stock of all classes, not only of the stock which the taxpayer and the other stockholders of Peerless and Union formerly owned in those companies, but as a direct result thereof the stock of the company to which all of the assets of the three prior existing corporations were transferred.* This resulting acquisition did not deprive Atlas of the fruits of its exchange with the stockholders of the old companies.

It is for this reason that *Bassick* v. *Commissioner*, 85 Fed. (2) 8 (C. C. A. 2), certiorari denied 299 U. S. 592, and *Starr* v. *Commissioner*, 82 Fed. (2) 964 (C. C. A. 4), certiorari denied 298 U. S. 680, cited by Petitioner in his Supplemental Brief (p. 8), do not require a contrary conclusion. The issue in the *Bassick case* was whether Bassick had acquired statutory control (80 per cent) of the stock of the new company upon his acquisition of the first stock issued by the new company. Under the plan of reorganization, however, he was *bound* to transfer a portion of that stock to another corporation for a *cash* consideration and the new company was also *bound* to make an additional issue of its stock direct to the other corporation. Upon consummation of the entire plan Bassick did not have statutory control of the stock of the new company, nor of any other company into which its assets had been transferred.

This decision has no application to the instant case since Atlas, upon giving up the outstanding stock of the old com-

[11] In fact, so far as the assets of Black Diamond are concerned, the Atlas interest became more direct, in that the assets themselves were transferred to the new company, whereas before this transfer the Atlas interest was merely as owner of all of the Peerless stock, which company in turn owned all the stock of Black Diamond.

panies immediately received and retained ownership of a majority of the stock of each class of the new company to which the assets of the old companies were transferred.

Under the procedure adopted in the instant case, it is not significant that Atlas did not retain ownership of the stock of Peerless and Union since Atlas had the option to transfer the assets rather than the stock of the old companies to the new company. Furthermore that stock did not remain in the ownership of any party. Upon its receipt by the new company it was delivered to the old companies for cancellation.

In *Starr* v. *Commissioner*, *supra*, the taxpayer, in redemption of a part of his common stock in the old company, following a transfer of the latter's assets to a newly organized company, received cash and a dividend of special stock of the old company, which taxpayer exchanged for common stock of the new company, said cash and common stock of the new company being a part of the consideration the old company received for the transfer of its assets. The taxpayer exercised his option under the plan to deliver the balance of his common stock in the old company to the new company for shares of its preference stock at an agreed rate of exchange. He contended that the three transactions were separate and distinct, in two of which stock was exchanged for stock and no profit was realized, and that only in respect to the transfer of stock for cash was a taxable profit realized.

The Court held that the gain must be determined on the basis of the total considerations, all of which the taxpayer received for his common stock of the old company, as a part of the plan. This decision is in no way inconsistent with our position here, as we do not rely upon any single step or transaction under the plan without regard to the results accomplished by the plan as a whole.

To say that the acquisition by Atlas of the stock of the old companies did not constitute a reorganization because that stock was thereafter exchanged for stock of the new company which took the place of the old companies, is to

exalt form above substance to a degree inconsistent with the purpose of the statute. *Gregory* v. *Helvering*, 293 U. S. 465.

3. Nor is the basic distinction in the facts of the instant case, as compared with those in the *Groman case*, one merely in the form or mechanics by which the transaction was consummated (as contended by Petitioner), however important the difference in the form may be. The real significance of the difference in facts is that here the plan contemplated a consolidation of three existing businesses with Atlas through direct exchanges between Atlas and the stockholders of those companies. That consolidation was effected *through exchanges of stock*, the resulting transfer of assets being purely a corollary or subsidiary transaction effected by Atlas without the participation of the stockholders of Peerless and Union. Even more significant is the result accomplished, wherein Atlas acquired not merely a majority of the common stock of the new company (as in the *Groman case*) but *all of its stock of both classes*, thus bringing it squarely within the provisions of Sections 112(i)(2) and 112(b)(3) of the statute. That this distinction is one of substance and not merely form is clearly demonstrated by assuming a slight change in the form of the plan used in each case.

For example, had the stockholders of Peerless and Union formed the new company into which the assets of those companies were transferred, there would be no question but what the subsequent delivery by those stockholders of all of the preferred stock and 57 per cent of the common stock of the new company to Atlas in exchange for cash and Atlas common and preferred stock would have constituted a reorganization under Section 112(i)(1)(A) and Atlas would clearly be a party thereto. *Helvering* v. *Watts*, 296 U. S. 387.

Applying the same change to the plan adopted in the *Groman case* would not affect the decision reached in that case by this Court. Had the shareholders of Indiana or-

ganized Ohio, transferred to it the assets of Indiana, and thereafter delivered to Glidden the common stock of the new company in exchange for cash and Glidden prior preference stock, that exchange would not have constituted a reorganization under Section 112 (i)(1)(A) and, therefore, Glidden could not have been a "party" within the meaning of the statute. Nor would the relation of Glidden to the reorganization thus effected by the stockholders of Indiana with the new company be materially different from Glidden's relation to the reorganization as actually effected.

Thus, the distinction in facts between the cases, in their relation to the reorganization statutes, is one of substance.

To summarize the foregoing, it is the inescapable conclusion to be drawn from an analysis of the separate transactions into which the negotiations in the instant case culminated, that in them there was a direct exchange between the stockholders of the old companies and Atlas in which the former delivered to Atlas substantially all of the stock of the old companies and received therefor Atlas stock and other considerations. Atlas was under no obligations with respect to the stock received, excepting only its commitment to cause the *assets* of those companies to be transferred to the new company and it was immaterial to the stockholders of the old company what disposition Atlas made of their stock.

The result of the exchanges between Atlas and the stockholders of the old companies was to effect a reorganization in the nature of a merger or consolidation of Peerless and of Union with Atlas. *Pinellas Ice & Cold Storage Co.* v. *Commissioner,* 287 U. S. 462. *Helvering* v. *Watts, supra.* The Petitioner does not deny that these exchanges would constitute a reorganization but for the fact that Atlas converted the form of its interest to stock of the new company, which, as we have shown, did not deprive Atlas of its direct proprietary interest in the business and assets of the old companies. It is clear that Atlas was not deprived of that interest. In fact, it was because of this clear distinction in

the facts that Respondent in his Brief in Opposition to the issuance of a Writ of Certiorari contended that the Opinion of the Seventh Circuit Court of Appeals in the *Groman case* was not in conflict with the controlling part of the decision in the instant case. We believe for the same reason that it is not in conflict with that part of the Opinion of this Court in the *Groman case.*

4. Petitioner admits also that there was a statutory reorganization effected between Atlas and the new company, and that Atlas was a party to that reorganization within the meaning of Section 112(i)(2) (Petitioner's brief, p. 10). Based alone on this admission, we submit that even without consideration of the other steps in the plan, Atlas thus qualified as "a party to the reorganization" within the meaning of Section 112(b)(3) since that transaction was an indispensable and component part of a single plan of reorganization wherein Peerless and Union were consolidated with Atlas. As stated in our original Brief (p. 15), the Commissioner may not break up the plan as a whole into unrelated steps or parts to assert a tax.

Section 112(b)(3) provides—

> "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in *another corporation a party to the reorganization.*" (Emphasis added.)

Within the natural meaning of the words in this section they are applicable to any transaction constituting a reorganization effected in the consummation of the plan as a whole. Thus, in the instant case, the Court may conclude that there were a number of reorganizations. The Petitioner admits that there were at least two reorganizations here, one in the transfer of assets of the old companies to the new and one in the acquisition by Atlas of the majority of the stock of both classes of the new company.

This section does not confine the expression "*another corporation* a party to the reorganization" to any one particular corporation in a single reorganization. Petitioner admits that the new company is "another corporation" in the reorganization between Atlas and the new company (his Supplemental Brief, p. 10), but, without citing any authority to support his position, contends that this section is not applicable to that reorganization under the facts in the instant case. We submit that Petitioner is not justified in asking this Court to read into the plain language of the statute an interpretation not clearly shown to have been intended by Congress. Congress in enacting Section 112(i)(2) into the statute intended to remove any doubt that may have existed as to certain corporations that qualify as a party to a reorganization. See Petitioner's original Brief (p. 15), citing H. R. Rep. No. 179, 68th Congress, 1st Session, wherein it refers to the intention of Congress in enacting the section of the 1924 Act corresponding to Section 112 (i)(2) of the 1928 Act. At page 13 of the same Report (which corresponds to a similar part of the Senate Report) Congress disclosed its liberal policy of non-recognition of gain in ordinary business transactions, wherein it said:

> "Congress has heretofore adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, it is even more necessary to exempt from tax the gain realized by the corporation."

Atlas was "a party to the reorganization" within the natural meaning of the terms irrespective of the application of section 112 (i) (2) of the Revenue Act of 1928.

Even assuming that Atlas was not a party under Section 112 (i)(2) to a reorganization as defined in Section 112 (i)(1)(A) it would none the less qualify as a party to the admitted reorganization which was effected between the old companies and the new company.

This Court in the *Groman case* held that Section 112 (i)(2)

> "* * * is not a definition but rather is intended to enlarge the connotation of the term 'a party to a reorganization' to embrace corporations whose relation to the transaction would not in common usage be so denominated or as to whose status doubt might otherwise arise."

In reaching the conclusion that Glidden was not, in the natural meaning of the term, a party to the reorganization, the Court said that: "Glidden received nothing from the shareholders of Indiana. Glidden transferred nothing to them. The exchange was between Indiana's shareholders and Ohio." Under the circumstances of that case, the Court concluded that "Glidden was, in the transaction in question, no more than the efficient agent in bringing about a reorganization."

In the instant case, Petitioner admits that there was a reorganization effected between the old companies and the new. We submit that Atlas was "a party" within the ordinary meaning of that term to *that* reorganization. Atlas was more than an efficient agent in bringing it about. It was a direct party in fact to the exchanges with the old stockholders and with the new company, which effectuated that consolidation. Atlas actually acquired the stock of Peerless and Union, *which was the sole asset transferred by the stockholders of those companies.* The new company

acquired the stock of Peerless and Union from Atlas. Atlas, unlike Glidden, transferred to the stockholders of the old companies the sole consideration they received in the exchange, to wit: Atlas stock, cash and stock of the new company. Thus the agreement constituting the plan and the exchanges which consummated it were solely between Atlas and the shareholders of Peerless and Unión. Thus Atlas in the instant case performed the combined functions exercised by Glidden and Ohio in the *Groman case*.

On the facts in this case there was sufficient continuity of interest qua the Atlas stock within the meaning of the statute.

1. Petitioner's objection that the Atlas stock in Respondent's hands does not represent a definite, material and substantial interest in the assets transferred by the taxpayer was raised in this Court for the first time.

In the Board of Tax Appeals it was Petitioner's contention that the transaction here involved was a sale and not a reorganization, and that even if there was a reorganization Atlas was not a party thereto because it did not acquire a majority of all classes of stock of the new company. Defeated on these questions of essential fact, Petitioner in the Circuit Court of Appeals abandoned assignments of error in the findings of the Board, admitted that there had been a reorganization between the old companies and the new, but maintained that Atlas was not a party thereto because it had deliberately employed a circuitous scheme to bring about the reorganization. In this contention, Petitioner relied principally, if not entirely, on *Bus and Transport Securities Corp.* v. *Helvering,* 296 U. S. 391.

It was not until Petitioner sought from this Court the issuance of a Writ of Certiorari that he raised the question of continuity of interest. It is, therefore, submitted that it is not open to Petitioner to urge this point before this Court, any more than it was open to the petitioner in *Helvering* v.

Minnesota Tea. Co., 296 U. S. 378, to raise for the first time before this Court the question whether or not, in the transaction there involved, substantially all of the assets of the taxpayer had been transferred (see Opinion of this Court in that case at page 380).

2. Assuming, however, that Petitioner may raise this question here, it is proper to inquire how the doctrine of continuity of interest has been developed in previous cases, and how, if at all, it is applicable in the circumstances of the instant case.

The doctrine of continuity of interest was first invoked in *Cortland Specialty Co.* v. *Commissioner*, 60 Fed. 2nd, 937 (C. C. A. 2nd), certiorari denied, 288 U. S. 599, as an implied essential of a "merger" or "consolidation". The Court's summarized statement on the subject in that case is:

> "In defining 'reorganization', Section 203 (now 112) of the Revenue Act gives the widest room for all kinds of changes in corporate structure, but does not abandon the primary requisite that there must be some continuity of interest on the part of the transferor corporation or its stockholders in order to secure exemption. Reorganization presupposes continuance of business under modified corporate forms." (Parenthetical expression added)

In its opinion in *Pinellas Ice and Cold Storage Co.* v. *Commissioner*, *supra*, this Court approved the foregoing language and followed the same reasoning in deciding that the term "securities", as used in the reorganization sections of the Revenue Act there under discussion, was not intended to include short term notes.

Following the *Pinellas case* comes that group of cases decided by this Court, which includes *Nelson Co.* v. *Helvering*, 296 U. S. 374, *Helvering* v. *Minnesota Tea Co.*, *supra*, and *Helvering* v. *Watts*, *supra*. There is nothing in the language of these cases which increases the limitations in the requirement of continuity of interest, unless it is in the

following language from the opinion in the *Minnesota Tea case:*

> "And now we add that this interest must be definite and material; it must represent a substantial part of the value of the thing transferred. This much is necessary in order that the result accomplished may genuinely partake of the nature of merger or consolidation."

Thus, the doctrine has been invoked in one case (the *Pinellas case*) to assist in defining what was meant by the word "securities", a term not given a specific definition in the statute itself. In the other cases, it has been used as a test to determine whether or not the transaction partook of the nature of merger or consolidation, *i.e.*, whether or not there had been a reorganization.

Thus far there is nothing in the judicial declarations which, reasonably applied, can exclude the Respondent in the instant case, because here we are not concerned with the definition of the term "reorganization", nor with the question of what constitutes "a substantial part of the value of the thing transferred". Therefore, the doctrine of continuity of interest, as expounded in the decisions of this Court preceding the *Groman case* have no bearing here.

Does the decision of this Court in the *Groman case* require us to alter this conclusion? In that case this Court was called upon to decide whether or not Glidden was a party to the reorganization between Ohio and Indiana. The taxpayer had to admit that Glidden did not come within the literal terms of Section 112 (i) (2) because it had not acquired at least a majority of all classes of stock of any other corporation in the reorganization. Petitioner in that case therefore urged that the description of "a party to a reorganization" in Section 112 (i) (2) was not an exclusive definition of that phrase, and that Glidden, by reason of its intimate connection with the reorganization, was in fact a party thereto.

This Court determined that that section was not an exclusive definition of the phrase "a party to a reorganization". It, therefore, went on to determine whether or not Glidden, which had *not* complied with the literal terms of Section 112 (i) (2), could nevertheless be held a party to the particular reorganization in question.

The facts of the case were analyzed and it was found that in the transaction Glidden had received nothing from the Indiana shareholders and had transferred nothing to them. In fact, it had been no more than the efficient agent in bringing about the reorganization. Hence, this Court said:

> "It was not, in the natural meaning of the term, a party to the reorganization."

But the taxpayer had argued that Ohio had been no more than the *alter ego* of Glidden in the transaction. To dispose of this argument and to remove any further doubt that there might be that Glidden, not a party within the literal terms of the statute, should nevertheless qualify as such on the facts of the case, this Court analyzed the situation from the viewpoint of continuity of interest, and found that Glidden's stock in the hands of Indiana's former shareholders did not, because of Glidden's ownership of the common stock of Ohio, represent a continued substantial interest in the assets transferred to Ohio. In other words, in fortifying its conclusion that Glidden was not a party to the reorganization within the ordinary meaning of the words employed in the statute, the Court found, under its application of the doctrine of continuity of interest, that Glidden was not "a party" within the spirit of the statute.

Here the facts are materially different. If, as hereinabove urged on behalf of the Respondent, there was an exchange between Atlas and the stockholders of the old companies within the meaning of Section 112 (i) (1) (A) and Section 112 (i) (2), in which substantially all of the stock of Peerless and Union was exchanged for Atlas stock, there can be no question but what there was continuity of inter-

est qua the Atlas stock. If, on the other hand, Atlas' acquisition of the stock of the new company is alone to be considered, it acquired not only a majority of the *common* stock of the new company, but *all of its preferred stock.* This compliance with the literal terms of the statute *imports* a continuity of interest, and there is no need or warrant to analyze the transactions further if such literal compliance is found to exist. To do so would, in effect, be to change or amend the statute by judicial interpretation.

In the parenthetical clause of Section 112 (i) (1) (A) and in Section 112 (i) (2) Congress has indicated that it attaches importance to the degree or amount of stock interest acquired in the determination of whether or not there is a reorganization and whether the acquiring corporation was a party thereto. Here Atlas has not only acquired a substantially greater proportion of stock in the new company than Glidden did in the *Groman case*, but it has acquired such stock *to the degree specifically set forth in those sections.*

Furthermore, if, because of Atlas' direct participation in *all* of the transactions and exchanges here involved, it is a "party" to the admitted reorganization between the old companies and the new, within the ordinary and usual meaning of that word as used in Section 112 (b) (3)[12] then it should not be necessary to consider the doctrine of continuity of interest in this connection.

There is no claim here that the new company was the *alter ego* of Atlas. As pointed out above, the purpose of the new company here was not to act for Atlas in the reorganization. The new company did nothing. It did not acquire the stocks of the old companies direct from their stockholders. It transferred nothing to them. It simply served, by agreement of all parties to the transaction, as the corporate entity into the possession and ownership of

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[12] See argument in the second main point of this Brief beginning at page 17.

which all of the *assets* of the old companies were transferred.

Does the language of the Opinion in the *Groman case* preclude the finding here that Atlas was a party to the reorganization? In answering the petitioner's argument in that case that Ohio was to be considered the *alter ego* of Glidden, this Court said:

> "But to do so would be to ignore the purpose of the reorganization sections of the statute, which, as we have said, is that where, pursuant to a plan, the interest of the stockholders of a corporation continues to be definitely represented in substantial measure in a new or different one, then to the extent, but only to the extent, of that continuity of interest, the exchange is to be treated as one not giving rise to present gain or loss. If cash or 'other property',—that is, property other than stock or securities of the reorganized corporations,—is received, present gain or loss must be recognized."

It is respectfully submitted that this language must be read as applying *strictly to the particular facts of the case under consideration, i.e.*, that there had been no literal compliance with the provisions of Section 112 (i) (2), and that the corporation sought to be considered a party to the reorganization had been found on the facts to be no more than the efficient agent in bringing about the only reorganization effected in that case.

If this language is to be considered as broadly laying down a rule for future guidance in determining *in all cases*, irrespective of whether or not there has been compliance with Section 112 (i) (2), who is a party to a reorganization, then the last sentence of that part of the Opinion of this Court quoted above, appears to be wholly inconsistent with the language of the statute and all prior applications and interpretations of it, unless, of course, the words "reorganized corporations" are to be taken to mean all corporations *which are parties to the reorganiza-*

tion. The distinction as to what "other property" is, must necessarily be drawn from the requirements as to "stock or securities" set forth in Sections 112 (b) (3) and (4). In these sections the requirement is, *not* that the "stock or securities" on which "no gain or loss shall be recognized" must be "of the reorganized corporations", *but* that they must be of "a corporation a party to the reorganization". Clearly a party to the reorganization may be a corporation other than the corporation which is reorganized. For example, a new corporation to which the assets of the old corporation are transferred is specifically made a "party to a reorganization" under Section 112 (i) (2), but certainly the new corporation is not a *re*organized corporation. In fact, in neither the *Groman case* nor the instant case was it questioned that the new company was a party to the reorganization.

Furthermore, if this language is to be taken as laying down a rule of broad application, then the word "party" as used in Sections 112 (b) (3) and 112 (i) (2), is necessarily limited to the *transferee* and the *transferor* corporations. If Congress had meant so to limit the meaning of "another corporation" to the transferor and transferee corporations, it could easily have said so in language much more simple and direct than the present language of Sections 112 (b) (3) and 112 (i) (1) and (2). It is earnestly submitted, therefore, that the above quoted language from the Opinion of this Court in the *Groman case* must be read strictly as an answer to the *alter ego* argument advanced by the petitioner in that case, and as strictly applicable only to the particular facts of that case. Any broader construction of this language would effect, by judicial decision, a substantial alteration and amendment of the statute.

Assuming, however, that this language from the Opinion in the *Groman case* is broadly applicable as interpreting the reorganization sections of the Revenue Act of 1928, even then Atlas qualified as a *direct party* to the only trans-

action in the instant case which, treating substance rather than form, involved the real reorganization intended and negotiated by the parties. It transferred Atlas stock and other considerations to the taxpayer in a direct exchange with him for his Peerless stock. This undoubtedly constituted a reorganization as that term is defined in Section 112 (i) (1) (A). See *Helvering* v. *Watts, supra.* If in that case, this Court found that the Vanadium stock in the hands of Watts represented a definite and substantial continuing interest on his part in the asset which he had transferred, viz., his Ferro-Alloys stock, then here the Atlas stock in Respondent's hands represented a definite and substantial continuing interest in the Peerless stock with which he had parted to Atlas. What Atlas did, on acquiring this stock, was merely to effect a rearrangement of the *form* of that asset in its hands, and, so far as Respondent was concerned, it mattered not at all, from the point of view of the substance of the transaction, that, through a transformation consistent with the purpose of the plan this Peerless stock passed out of existence and was replaced by stock of the new company.

Consequently, Atlas should be regarded as a party to the reorganization, and the gain upon the acquisition of its stock is, therefore, not subject to recognition under Section 112(b)(3) of the Revenue Act of 1928.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 33.—October Term, 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Raymond I. Bashford. | On Certiorari to the United States Court of Appeals for the Third Circuit.

[January 3, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

Whether Bashford is liable for a deficiency in the income taxes assessed for the year 1930 depends upon whether Atlas Powder Company was, as defined by § 112 (i) (2) of the Revenue Act of 1928, "'a party to the reorganization'" of the Peerless Explosives Company.

Atlas Powder Company desired to eliminate the competition of three concerns—Peerless Explosives Company, Union Explosives Company and Black Diamond Powder Company. Deeming it unwise to do so by buying either their stock or their assets, Atlas conceived and consummated a plan for consolidating the three competitors into a new corporation, with Atlas to get a majority of its stock. To this end holders of the stock of the three companies were duly approached by individuals who represented Atlas; their agreements to carry out the plan were obtained; the new corporation was formed and became the owner practically of all the stock, and all the assets, of the three competitors; Atlas became the owner of all the preferred stock and 57% of the common stock of the new corporation; and in exchange for the stock in the three companies each of the former stockholders received some common stock in the new company, some Atlas stock, and some cash which Atlas supplied.

Bashford, one of the stockholders in Peerless, received in exchange for his stock 2,720.08 shares of the common stock of the new corporation, $25,306.67 in cash, 625 shares of Atlas preferred, and 1344 shares of Atlas common. In his income tax return for the year 1930 he included all the cash, but did not include the gain on stock of either the new corporation or Atlas. The Commis-

sioner concedes that gain on the stock in the new corporation was properly omitted, since the new company was a "reorganization" of Peerless. He insists that the Atlas stock should have been included, as it was "other property" on which gain was taxable under §112 (c) (1) of the Revenue Act of 1928, since Atlas was not "a party to the reorganization". The Board of Tax Appeals (33 B. T. A. 10) held that Atlas was "a party to the reorganization", and hence that gain on its stock was properly omitted by Bashford. The Circuit Court of Appeals for the Third Circuit affirmed that judgment. 87 F. (2d) 827. Because of alleged conflict of the decision with *Commissioner* v. *Groman,* 86 F. (2d) 670, we granted certiorari in both cases.

In *Groman* v. *Commissioner,* decided by us November 8, 1937, we gave the following construction to the reorganization sections here involved:

"Where, pursuant to a plan, the interest of the stockholders of a corporation continues to be definitely represented in substantial measure in a new or different one, then to the extent, but only to the extent, of that continuity of interest, the exchange is to be treated as one not giving rise to present gain or loss."

Applying the rule, we held there that the Glidden stock received by Groman was "other property" and he, therefore, liable on the deficiency assessment; because the Glidden Company was not "a party to the reorganization", although it had, pursuant to agreement with the stockholders of the Indiana corporation, caused it to be reorganized as an Ohio corporation; had taken for itself all the common stock of Ohio; and had distributed among the former stockholders of Indiana the Ohio preferred stock and some Glidden stock, as well as cash, which it supplied. Applying the rule here, we hold likewise that the Atlas stock was "other property" and Bashford, therefore, liable on the deficiency assessment; because the Atlas Powder Company was not "a party to the reorganization".

Bashford contends that there is a clear distinction in the facts between the case at bar and the *Groman* case which should lead to a different conclusion here. The differences mainly relied upon are these:

1. In the Groman case, the court found that Glidden did not acquire a majority of the shares of the voting stock and a majority

of the shares of all other classes of stock involved, whereas here the facts were as follows: Atlas acquired "not only a majority of the voting stock and a majority of the stock of all other classes of another corporation (the new company) in the reorganization, but of all the other corporations (Peerless and Union) in the reorganization."

2. "Atlas acquired as part of the plan, substantially all of the shares of Peerless and Union in direct exchanges with the taxpayers and the other stockholders of those companies in part consideration for which it delivered to the shareholders 6,318 shares of Atlas preferred stock and 8712½ shares of common."

3. "Atlas, unlike Glidden was a party to all the exchanges, while the new company was a party only to exchanges with Atlas."

4. "The stockholders of Peerless and Union did not participate in the contract or exchange between Atlas and the new company."

Any direct ownership by Atlas of Peerless, Black Diamond, and Union was transitory and without real substance; it was part of a plan which contemplated the immediate transfer of the stock or the assets or both of the three reorganized companies to the new Atlas subsidiary. Hence, under the rule stated, the above distinctions are not of legal significance. The difference in the degree of stock control by the parent company of its subsidiary and the difference in the method or means by which that control was secured are not material. The participation of Atlas in the reorganization of its competitors into a new company which became a subsidiary did not make Atlas "a party to the reorganization". The continuity of interest required by the rule is lacking.

Reversed.

Mr. Justice ROBERTS took no part in the consideration or decision of the case.

Mr. Justice MCREYNOLDS, Mr. Justice SUTHERLAND and Mr. Justice BUTLER are of opinion that the Board of Tax Appeals and the Circuit Court of Appeals reached the right conclusion, and that the judgment below should be affirmed.